152 f.

PRECEDENTS IN CHANCERY:

BEING A

COLLECTION OF CASES

ARGUED AND ADJUDGED

IN THE

HIGH COURT OF CHANCERY,

From the YEAR 1689 to 1722.

The SECOND EDITION, Revised and Corrected,
With NOTES and REFERENCES to the former and latter REPORTS,

BY THOMAS FINCH, ESQ.

Of the INNER-TEMPLE, BARRISTER at LAW.

Multa renascentur—— HORAT.

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FH
MVSEVM
BRITANNICVM

THE following collection of Caſes has been juſtly eſteemed as a valuable treaſure, conſiſting of many important points, which were argued and determined at a period, when the practice of the Court of Chancery was happily reduced into a regular and uniform ſyſtem of juriſprudence.

It is ſuggeſted by Mr. *Viner*, in his Abridgment *, that the notes of theſe Caſes were taken by Mr. *Pooley*, a barriſter of conſiderable reputation at that time; to whom he aſcribes the merit of being † the author of that judicious compilation, the firſt part of the Abridgment of Caſes in Equity. It has alſo been ſaid, that Lord *Hardwicke* obſerved, that the notes down to 1708 were taken by Mr. *Pooley*, and the remainder by Mr. *Robins*.

Theſe Reports having been long ſince extremely ſcarce and difficult to be procured, it is become expedient to republiſh them; and as ſome additions to the original impreſſion may naturally be expected upon its ſecond appearance, it has been attempted to render it more acceptable than the former, by inſerting numerous references, not merely to the other Reports, in which the following caſes are ſtated, abridged, or cited, but to the

* 5 Vin. Abr. (tit. Conſideration) 408, pl. 19, *in the margin.*

† 21 Vin. Abr. (tit. Trial) 489, pl. 10, *in the margin.*

various authorities (including ſome late deciſions) which ſeem to apply either in affirmance or denial of the ſeveral points therein argued and determined.

How far the Editor has ſucceeded in the preſent attempt, he leaves to the Reader to decide, truſting that an endeavour to extend the utility of ſuch a deſirable work, as Precedents in Chancery, will be deemed a ſufficient apology for his preſumption.

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Termino S. Hillarii, 1689.

In Curia Cancellariæ.

Lords Commiſſioners { Maynard, Keck, *and* Rawlinſon.

Back *verſus* Andrews.

Caſe 1.
11 *January.*

J. S. purchaſed a copyhold to himſelf, his wife, and his daughter, and their heirs, and afterwards ſurrenders this copyhold to the plaintiff, and his heirs, for ſecuring a ſum of money, and dies; the plaintiff brought this bill to have the eſtate made good to him, and the queſtion was, Whether he ſhould have any, or what part of the land?

2 Eq. abr. 230, c. 2. S. C. 2 Vern. 120. S. C. *A.* purchaſes a copyhold in his own, his wife, and daughter's names, and afterwards ſurrenders it for advancement for the ſecuring a debt to *J. S.* *J. S.* not intitled to any part of the lands, it being an advancement for the wife and daughter, and the huſband and wife taking one moiety thereof by intireties.

For the plaintiff, it was inſiſted, he ought to have the whole, for that the whole purchaſe-money was the money of *J. S.* and the wife and daughter were but truſtees for him; but at the worſt he muſt have the huſband's ſhare.

For the defendant, it was inſiſted, that this purchaſe ſhould be looked upon as an advancement for the wife and daughter, and they not to be truſtees, and the huſband and wife took by intireties; and ſo the ſurrender of the huſband could paſs no part of the lands, and it being a copyhold, the plaintiff might have * informed himſelf how the title ſtood; and of that opinion 2

were all the commiſſioners; ſo the bill was diſmiſſed, but without coſts.

Caſe 2.

Gower *verſus* Mead.

25 *January.*

2 Eq. abr. 369, c. 4. S. C. Gilb. Can. 270. 311. 2 Vern. 120. 302. 568. Caſes temp. Talb. 53. 2 Wms. 335.—*è contrà*, 1 Eq. abr. 270, pl. 5. 271, pl. 13. Caſes temp. Talb. 202. 1 Wms. 730. 2 Wms. 366. 3 Wms. 325. Poſt 101 †.

A. makes *B.* his executor, and deviſes to him 20*l.* and his real eſtate to *J. N.* upon condition that he pay his debts and legacies, the perſonal eſtate ſhall be applied in eaſe of the real, in diſcharging the debts and legacies.

A Man makes his will, and *J. S.* his executor, and gives him a legacy of 20*l.* and deviſes all his lands to *J. N.* and his heirs, upon condition, that he pay his debts and legacies; and if the debts were not paid within two months after his death, and the legacies within three months, then the creditors and legatees might enter; and the only queſtion was, Whether in this caſe the perſonal eſtate ſhould be firſt applied in eaſe of the real eſtate deviſed to *J. N.*?

Serjeant *Phillips* for the plaintiff argued, that the perſonal eſtate ſhould not be liable in this caſe, and ſaid, it was the ſame, as if the teſtator had deviſed lands to *J. N.* upon condition to pay 20*l.* to *A.* and 20*l.* to *B.* and in that caſe, without queſtion, the deviſee of the lands could have no advantage of the perſonal eſtate.

Serjeant *Hutchins*, for the defendant. It is a ſettled rule, that *Hæres Factus* ſhall have the benefit of the perſonal eſtate, as well as the *Hæres Natus*; and tho' the perſonal eſtate had been deviſed to the executor; yet if it were not ſaid, without being liable to debts, it ſhould be applied, in eaſe of the real eſtate; and to that purpoſe was the caſe of *Turner and Zouch, and Cook and Guavas* in the Exchequer; if a man makes a mortgage, and does not covenant to pay the mortgage-money; yet the perſonal aſſets ſhall be firſt applied in eaſe of the real eſtate; and ſo it muſt be in the preſent caſe.

1 Chancery Caſes, 223. S.P.

Poſt 61. 99. 477. 2 Salk. 449. 1 Vern. 436.

Lord Commiſſioner *Maynard*. If a man deviſes his real eſtate to another, upon condition to pay his debts, and does not diſpoſe of his perſonal eſtate, that ſhall be firſt applied in eaſe of the real eſtate: and here the * condition annexed to the deviſe, is not a condition to avoid the whole eſtate, but only to give an entry to the creditors and legatees.

2 Vent. 349. Caſes T. T. 204.

† Vide the caſe of *Wainwright* v. *Bendlowes*, Poſt 451, and the note thereto ſubjoined.

Keck.

Keck. The creditors have likewiſe a bill now at hearing, and have a demand primarily againſt the perſonal eſtate, and may certainly take their remedy againſt that, if they pleaſe. Suppoſe in this caſe there had been no executor named, the adminiſtrator muſt certainly have applied the perſonal eſtate in eaſe of the real; and the executor does take no more to his own uſe than an adminiſtrator; therefore the perſonal eſtate muſt be applied.

Rawlinſon. There is a diverſity betwixt *Hæres Factus*, and a deviſee of particular lands; for *a deviſee of particular lands ſhall not have the benefit of the perſonal eſtate*, but *Hæres Factus of the whole eſtate ſhall.*

Hæres Factus of the whole eſtate ſhall have the benefit of the perſonal eſtate, *but a deviſee of particular lands ſhall not.*

è contrà, 1 Vern. 36. 2 Chan. Caſes, 84. Caſes temp. Talbot, 55. 2 Atk. 436 †.

Deveniſh *verſus* Baines.

Caſe 3.

2 Eq. abr. 43. c. 4. S. C.

BY the cuſtom of the manor of *Yetminſter Prima* in *Devonſhire*, every copyhold tenant of that manor, may, in the preſence of two witneſſes, nominate his ſucceſſor, and ſuch nominee ſhall enjoy the lands after him for life; and the perſon who nominates may except any part of the lands to any other perſon, yet the nominee continues tenant to the lord for the whole, but the perſon to whom any part is excepted ſhall enjoy that part during his life; and if any tenant dies ſeiſed, leaving a wife, and makes no nomination, then the wife ſhall have the tenement during her life, elſe it goes to the lord.

4

A copyholder by his will intending to give the greateſt part of his eſtate to his godſon, and the other part to his wife; the wife perſuades him to nominate her to the whole, and that ſhe would give the godſon the part deſigned for him; decreed againſt the wife, notwithſtanding the Statute of *Frauds* and *Perjuries*.

J. S. being a copyholder of this manor, and having a great affection for the plaintiff, who was his godſon, and intending to leave the greateſt part of his copyhold to him, and the reſt to his wife, when he was ſick, * was adviſing with ſome of the copyholders of the manor, how this might beſt be done, whether it were not beſt to nominate the plaintiff his ſucceſſor, with exception of ſuch part to his wife as he intended for her; but the wife being then preſent, pretended it might be prejudicial to her, as to the part intended her, and that if he would nominate

† Lord *Hardwicke* obſerved in *Galton* v. *Hancock*, that the firſt caſe, where the queſtion was determined in favour of a deviſee of part of the real eſtate only, was the caſe of *Pockley* v. *Pockley*, 1 Vern. 36. and that Lord *Nottingham*'s opinion had been followed ever ſince. 2 Atk. 436.

her his ſucceſſor, ſhe would take care the plaintiff ſhould have ſuch part of the land as was intended him, and offered to give ſecurity to that purpoſe; thereupon *J. S.* nominates her ſucceſſor, and dies; ſhe refuſing to let the plaintiff enjoy the lands intended him, he brought this bill to have them decreed to him: the defendant pleaded the Statute of *Frauds and Perjuries*, for that there was no memorandum, *&c.* in writing.

Serjeant *Hutchins* and others for the defendant, inſiſted, that the plaintiff could pretend to no decree but upon the wife's being a truſtee for him, or her having agreed that he ſhould have them; and all agreements concerning lands, and all truſts concerning lands, muſt be, by the expreſs words of the ſtatute, in writing.

2 Eq. abr. 43, c. 2. 465, c. 4. S. C. Chan. Caſes, 257. S. C. but not in point here. A ſon and heir apparent perſuades his father not to make a will, which he intended to have made, and which was to contain proviſions for his younger children, promiſing to do for them himſelf: equity will decree the heir to give them ſuch proviſions.

Serjeant *Philips* and others for the plaintiff, inſiſted, that copyholders are not within the ſtatute, and that caſes of like nature have been decreed here; as in *Chamberlain*'s caſe, which was this, The father being about to make his will, and thereby to make certain proviſions for his younger children; his ſon and heir apparent perſuaded him not to make any ſuch will, and that he would take care his brothers and ſiſters ſhould have thoſe proviſions; whereupon the father forbore to make the proviſions, and they were decreed againſt the heir in this court.

All the Commiſſioners were of opinion for the plaintiff, and ſaid, they decreed it not as an agreement or a truſt, but as a fraud; and they were of opinion, that ſeeing by the cuſtom of the manor an eſtate might * be created by parol without writing, a truſt of ſuch parol eſtate might likewiſe be raiſed without writing, notwithſtanding the ſtatute. And *Keck* ſaid, that where a tenant in tail was about to ſuffer a recovery, in order to provide for his younger children, and had been kept from it, by the iſſue in tail promiſing to do it; it had been decreed in this court.

Tenant in tail is prevented by the iſſue in tail from ſuffering a recovery, in order to provide for younger children, by his promiſing to do for them himſelf: equity will compel him to it, after the father's death.

Lord

In Curia Cancellariæ.

Lord Viſcount Teviot *verſus* Lady Spencer, & al' & econt'.

Caſe 4.
4 *February.*
In court all the *commiſſioners.*

SIR *Thomas Spenſer*, by fine and recovery and deed, dated 10 *May*, 12 *Car.* 2. ſettled the manor of *Y. &c.* on himſelf for life, and after on Sir *Benjamin Maddox* and others, for 21 years, to commence from his death; and after that leaſe, on *William Spenſer*, his ſon in tail, with remainder to his own right heirs, and the truſt of the term is thereby declared to be for raiſing 5000 *l. viz.* 2000 *l.* for the eldeſt daughter of Sir *Thomas*, that ſhould be unmarried at the time of his death, and to be paid at her age of 18 years, or marriage, which ſhould firſt happen; and the other 3000 *l.* to be equally divided amongſt his younger children, to be paid at their reſpective ages of 18 years, or days of marriage, which ſhould firſt happen: and in the deed there was a proviſo, that if *William Spenſer*, or any iſſue male of his body, ſhould pay or ſecure the 5000 *l.* according to the deed, then the leaſe to be void.

2 Eq. abr. 350, c. 1. S. C. A man has iſſue a ſon and four daughters; he ſettles lands on himſelf for life, remainder for 21 years, for raiſing 5000 *l.* daughter's portions, 2000 *l.* whereof to be paid the eldeſt, remainder to the ſon in tail, remainder to himſelf in fee. The ſon dies without iſſue, and after, the father deviſes the land to his four daughters equally, yet held that the eldeſt ſhould have 1000 *l.* more than any of the reſt.

Afterwards *William* the ſon died, and after Sir *Thomas* having no other ſons, made his will, and thereby deviſed the manor of *Y. &c.* to his wife for life, for increaſe of her jointure, and ſhe to pay 100 *l. per Annum* to his ſiſter, *&c.* and afterwards in the will there was this clauſe, *And thereby declare that I leave my lands of inheritance to deſcend to my daughters, as my heirs at * law, on account of my dying without iſſue male of my body; and that the lands hereby given to my wife, or ſettled in jointure on her formerly, ſhall not be charged with any portions or ſums of money to my ſaid daughters, by virtue of any former marriage ſettlement made by me.* 6

Sir *Thomas* dies, leaving iſſue four daughters, all unmarried; the eldeſt daughter afterwards married the plaintiff; and this bill was brought againſt the Lady *Spenſer* and the other three daughters and their huſbands; and the truſtees to have the benefit of this term, and to have the 2000 *l.* raiſed and paid to the plaintiff.

The defendants inſiſted, that the ſettlement made by Sir *Thomas* was only intended to be a proviſion for daughters, in caſe he had left iſſue male; and that failing, it ought in equity to be ſet aſide, and no uſe to be made of it: and the rather that Sir *Thomas*, who had an abſolute power to diſpoſe of the inheritance as he thought fit, had by his will declared, that his land ſhould not be charged with any marriage portion or ſum of money for his daughters, but that they ſhould have equal benefit of it; and their croſs bill was to the ſame purpoſe.

But the Lords Commiſſioners were all clearly of opinion that the plaintiff muſt have 1000*l.* more than the other ſiſters; and that if the other three ſiſters did not agree to pay her three fourth parts of that 1000*l.* out of their ſhares of the land, then the truſtees were to raiſe the money according to their power; and the Lady *Spenſer* was to be reimburſed out of the inheritance, what her eſtate for life ſhould be damnified in this matter.

7
Caſe 5.

* Fowkes *verſus* Joyce.

9 *February*.

2 Vern. 129. S. C. Vide Coke's Inſt. Harg. ed. 47. a. n. 11. 47. b. n. 1, 2, 3. 4 Burr. 1498.

The ſervants of a grazier driving a flock of ſheep to *London*, are encouraged by an inn-keeper to put the ſheep into paſture grounds belonging to the inn: the landlord ſeeing the ſheep, conſents they ſhall ſtay there one night, and then diſtrains them for rent. Grazier relieved againſt this diſtreſs.

THE defendant was owner of an inn, and certain lands belonging to it in *Barnet*, and had let that inn and lands to *J. S.* who was grown conſiderably in arrear of his rent. The plaintiff was a perſon who traded in ſheep and cattle, and had ſent his ſervants with a parcel of ſheep to be ſold at *London:* in their way they came to this inn; and as they had uſually done, by leave of the tenant, they put the ſheep into the ground, belonging to the inn, to lodge for that night.

Joyce the landlord immediately comes down to the ground, and pretended to be very angry that the ſheep were there; whereupon the drivers ſaid they were ſorry if they had done any thing amiſs, and if he pleaſed would take the ſheep out again, and give him any ſatisfaction for the time they had been there, which was not half an hour; whereupon *Joyce* aſked what they were to give a night, they replied 8*d. per* night a ſcore; then ſaid *Joyce*, if you

be cuſtomers to the inn, you may let them be there to night at that rate; whereupon they were continued in the grounds: and when the ſervants came in the morning to take them away, *Joyce* had diſtrained them for his rent, ſo they replevied the ſheep. And judgment being giving for *Joyce* in that action in *C. B. Fowke* the owner of the ſheep brought this bill to be relieved againſt that judgment, and was ſo.

The court relied on this reaſon, that when the drivers offered to take the ſheep out of the paſture again, at which time they were not diſtrainable for the rent, having not been *Levant* and *Couchant* upon the lands, they were by the *Fraud* and *Subtilty* of *Joyce* induced to leave them there all night, whereby they became liable to the diſtreſs; and it was decreed for the plaintiff with coſts, at law, and in equity.

* *Note*; The caſe of *Brodon* and *Pierce* was cited, where there being 20 years arrear of a rent-charge, and cattle came by eſcape out of the next ground, and were diſtrained, *&c.* the Lord *Nottingham* relieved againſt it in this court. 8

Anonymous. Caſe 6.

2 Chan. Rep. S. C. 190. Eq. abr. 201, plac. 14. S. C. 3 Wms. 112. 2 Atk. 103. (n. 104.) Brown's Rep. 127. *reſpecting a bond.—è contrà*, 1 Vezey, 273 †.

IN this caſe was cited the caſe of one *Earles*, before Mr. *Juſtice Jones*, ſitting in the abſence of my Lord *Chancellor*. A man by his will in writing, deviſed to his wife 1200*l.* in money, and all the goods and chattels, plate, jewels, and houſhold-ſtuff and ſtock upon the ground, in and belonging to his houſe in *N.* in which houſe there was 400*l.* in money; and if this 400*l.* ſhould paſs by the will, was the queſtion.

A. deviſes 1200*l.* to his wife, and gives her all the goods, chattels, plate, jewels, houſehold ſtuff and ſtock belonging to his houſe at *N.* 400*l.* which the teſtator had in ready money in the houſe, won't paſs by theſe words.

Decreed that it ſhould not, for 400*l.* is a conſiderable ſum, of which the teſtator cannot be ſuppoſed to be miſconuſant of its

† In the Counteſs of *Ayleſbury*'s caſe (which is mentioned in the authority referred to as above) Lord *Hardwicke* determined, that by deviſe of all things in an houſe, money and bank-notes paſſed to the teſtator's wife, and that the teſtator meant to conſider the notes, as caſh. His Lordſhip was inclined to think, that ready money, if not an extraordinary ſum and juſt received, would paſs by ſuch a deviſe.

being in the houſe; then had he an intent that that money ſhould have paſſed, he would not have couched it under the general words of all his goods and chattels, but would at firſt have given her 1600 *l.*

Memorandum; *In* Eaſter *term a new commiſſion paſſed for the cuſtody of the Great Seal; and Sir* John Trevor *and Serjeant* Hutchins *put in the places of Sir* John Maynard *and Sir* Anthony Keck.

Term. S. Trinitatis, 1690.

In Curia Cancellariæ.

Alathea Gofton, widow and relict of Francis Gofton, and Francis Gofton, adminiſtrator of the ſaid Francis *verſus* Sir John Mills.

Caſe 7.

Gilb. Can. 323. S. C. 2 Vern. 141. S. C.

THE caſe was this, the inteſtate *Francis*, about 1669, lent to *Edwin Sandys*, his brother-in-law, afterwards Lord *Sandys*, 400*l.* and the ſaid 200*l.* being unpaid, and the intereſt of it greatly in arrear. Lord *Sandys* makes his will in writing, and thereby deviſes to his brother-in-law *Francis Gofton* 400*l.* in full ſatisfaction *of all he can claim from him*, and deviſes to the plaintiff *Alathea* an annuity of 25*l. per annum* during her natural life; and after deviſes all his real eſtate to the defendant and his heirs, chargeable with the payment of his debts, and of the ſaid annuity; the plaintiff *Francis* refuſes the deviſe of the 400*l.* and this bill was exhibited to have the 400*l.* and intereſt, and the annuity deviſed to the plaintiff *Alathea*; and the cauſe being decreed to an account, it appeared by the maſter's report, that there was due for the ſaid 400*l.* and intereſt 800*l.* * and the only queſtion was, Whether the Lord *Sandys*'s real eſtate ſhould be charged with the whole 800*l.* by virtue of his will?

A. by will deviſes to *B.* 400*l.* which was the ſum lent, in full ſatisfaction of all the monies which he owed *B.* and ſubjects his real eſtate to the payment of his debts. The debt which *A.* owed *B.* amounted, by reaſon of intereſt, to 800*l.* but was barred by the Statute of Limitations: Court will ſuppoſe the teſtator miſtaken in his computation, and the whole debt ſhall be paid.

10

The

The defendant's counſel inſiſted, that this being a debt by ſimple contract, did not in its own nature charge the land; and therefore it can be no farther liable to it than the will has made it, and that the deviſor having given 400*l.* in full ſatisfaction of all demands, is a plain evidence, that either there was no more due, or at leaſt, that he intended to ſubject his land to no more; and that this caſe is the ſtronger, for that this debt by the length of time was barred by the Statute of Limitations.

The plaintiff's counſel inſiſted, that the deviſe of the 400*l.* is no evidence that there was no more due; and if the Lord *Sandys* did think that no more was due, yet it appears by the maſter's report that he was miſtaken, and he hath charged his lands generally with the payment of his debts, and the intereſt is as much a debt as the principal; and *tho' it were once barred by the Statute of Limitations, yet it continues a debt ſtill, and is as much within the truſt of the will, as any other of the teſtator's debts*; and it does no where appear in the will, that the teſtator intended, that *Francis Goſton*'s whole debt ſhould not be charged on the lands, tho' it ſhould be more than 400*l.*

Poſt 385.

All the Commiſſioners were clear, that the land ſhould be liable to the payment of the whole debt; and Lord *Rawlinſon* put this caſe, If a man ſhould recite in the beginning of his will, whereas he was indebted to *A.* 300*l.* to *B.* 400*l.* to *C.* 500*l.* *&c.* when, indeed, he owed *A.* 400*l.* *B.* 500*l.* and *C.* 600*l.* and afterwards ſhould, by that will, ſubject his lands to the payment of his debts, would they not be liable to pay all that was due to *A.* *B.* and *C.* notwithſtanding the teſtator's miſtaken recital in the beginning of his will? Certainly they would; and the caſe before us is the ſame.

A man by will recites his debts, and then ſubjects his real eſtate for the payment thereof, though he is miſtaken in ſome of the ſums recited, yet all his debts ſhall be paid.

11

Caſe 8. * Knap *verſus* Powell.

Gilb. Can. 329.
2 Eq. abr. 564, c. 2. S. C. Viner (Tit. Deviſe) 413, pl. 10, in nota. 1 Vezey, 310. 2 Vezey, 563, reſpecting intereſt. Select Caſes, temp. King, 72.

A legatee who has no notice of his legacy till the executor publiſhes it in the Gazette, ſhall have no intereſt for it.

THE plaintiff had a legacy deviſed to him, payable within a year after the death of the teſtator, who was his half brother; the plaintiff knew nothing of the legacy, nor of the teſtator's

tor's death, till the executor published it in the Gazette; and then he demanded his legacy of the defendant the executor, and the only conteſt was, Whether the plaintiff ſhould have intereſt from the time the legacy ſhould have been paid? The court would not give any intereſt, not ſo much as from the time of the bill exhibited; nor would they give coſts, even out of the aſſets, but the bare legacy.

Fiſk *verſus* Fiſk.

Caſe 9.

2 *July.*

2 Eq. abr. 429, c. 4. S. C. A mortgage, though forfeited, and though the heir buys in the equity of redemption; and though no defect of aſſets, yet ſhall go to the executor. But had the heir been in by deſcent of ſuch forfeited mortgage when he bought the equity of redemption, and no defect of aſſets, equity would not take it from him.

Thomas Fiſk the elder, had a mortgage in fee, which was forfeited; he makes his will, and deviſes all his mortgages to *Thomas Fiſk* the younger, and makes him executor and dies: *Thomas* the younger proves the will, and after dies inteſtate. The plaintiff takes out adminiſtration *de bonis non* to *Thomas* the elder, and alſo adminiſtration to *Thomas* the younger, and brings this bill againſt the mortgagor; and the defendant *Fiſk*, who was heir at law to *Thomas* the elder and younger, and had bought in the equity of redemption. This cauſe was heard on bill and anſwer, and it was agreed that both the *Fiſks* left ſufficient aſſets without this mortgage, and the bill was to have the defendant *Fiſk* to aſſign the mortgage, and have the money paid, or elſe to foreclоſe them.

And it was decreed, that the defendant *Fiſk* ſhould pay the plaintiff his principal, intereſt and charges to a day, or elſe aſſign the mortgage, and be foreclоſed; but my Lord Commiſſioner *Trevor* ſaid, if the mortgagee had been in poſſeſſion, and died ſo, he would not have * taken the mortgage from the heir, there being no defect of aſſets. 12

Caſe 10.

8 *July*.

Cordell *verſus* Noden.

Gilbert's Chan. 332. S. C. Poſt 81. 92. 162. 182. 566. Eq. abr. 244, pl. 5. S. C. 2 Vern. 148. S. C. 1 Vern. 473. 2 Vern. 648 *. 1 Wms. 7. 544. 2 Wms. 158 *. 3 Wms. 43. 2 Vezey, 91. 166. 2 Atk. 18. 3 Atk. 228.—*contrà*, Poſt 231. 323. 317. 2 Vern. 675 *. 736 *. 1 Wms. 114 *. 2 Wms, 212. * 338. 2 Vezey 27. 2 Atk. 45. 68. Brown's Rep. 333. S. C. cited. Vide the caſe of *Bayly* v. *Powell* (Poſt 92.) and the note thereto ſubjoined.

Thoſe marked thus * are caſes where evidence was admitted. *See as to this Mr. Cox's note in new edn. of P. Wms. v. 2. p. 150. 159.*

A. by will gives ſeveral legacies to his relations, amounting to near the value of his eſtate, and makes *B.* and *C.* his executors, and gives them 20*l.* and intreats them to take the trouble of getting in his eſtate. Teſtator lives ten years after, and acquires an additional eſtate. Decreed the ſurviving executor but an executor in truſt, and that the new acquired eſtate ſhould go to the legatees in proportion.

MR. *Cordell* being a merchant, and having an eſtate of about 2500*l.* and being about to go beyond ſea, in *December* 1674, makes his will, and in the beginning thereof deſires his mother, and the defendant Mr. *Noden*, *to take upon them the trouble of being his executors*, and makes them executors, and then goes on and ſets down all the particulars of his eſtate, and caſts them up, and then ſays, *All my eſtate aforeſaid, and whatever elſe belongs to me, I diſpoſe of as follows*; and then deviſes a legacy of 10*l.* to *Noden*, his executor; and ſeveral other legacies to his other relations, to the value of 2200*l.* and after the making of his will goes beyond ſea, and lives about ten years, and improves his eſtate to about 5500*l.* His mother dies, and ſeveral of his relations to whom he had deviſed legacies: and then the teſtator dies.

The bill was brought by the relations, who were legatees, againſt the defendant the executor, to have an account of the perſonal eſtate, and to have the ſurplus diſtributed amongſt them: it was taken notice of in the caſe, that Mr. *Noden* had uſually been a truſtee in the family; that the giving him a particular legacy, and the words, *deſiring him to take the trouble of the executorſhip*, and the computation made of his eſtate, and the deviſing all but ſo ſmall a part left for contingencies and funerals, was a plain evidence that he intended no advantage of an overplus to the executor.

The commiſſioners were all of opinion that the ſurplus ſhould be diſtributed; but in this caſe not according to the Statute of Diſtributions, but according to the proportion of each one's legacy, deviſed to him by the teſtator.

Attorney

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* Attorney General of the Dutchy, at the relation of Mr. Vermuden, plaintiff, *verſus* Sir John Heath, & al' defendants.

Caſe 11.

In the Dutchy Chamber at *Weſtminſter*, 9 *July*, Lord C. B. *Atkins*, and Mr. Juſtice *Ventris* ſitting in court. The Attorney General of the Dutchy Court exhibits an information in behalf of one part-owner of coal-mines, againſt the other; outlawry in the relator is a good plea.

THE information ſet forth, that the relator and defendants were part-owners of ſeveral coal-mines in *Derbyſhire*, that the king had a duty of *Lott* and *Cope* out of all the lead mines there; that by the cuſtom, if one owner were at expence for the improving or working a mine, all the owners ought to contribute and bear their part of the charge; that the relator had been at great charges in making ſoughs and other things for working and improving the mines, without which they could not be wrought (and ſo the king would loſe his duty) and that the defendant would not contribute or pay any part of the charge; therefore to make him account with the relator, and pay his part of the charge, was amongſt other things the ſcope of the information.

To this the defendant pleaded an outlawry in the relator, and it was long debated, whether the plea was good or not, and at length the plea was allowed by both the judges to be good; for tho' Mr. Attorney General be plaintiff, yet the relator is to have the whole benefit or loſs of the ſuit, and is himſelf party to it, for it would abate by his death, *&c.* and the king's name is only made uſe of by the form of the court, and he is not directly concerned at all, and very little by conſequence; and the ſuit is not for the king's duty, but the relator's intereſt.

2 Eq. abr. 1, c. 2. Treatiſe on Chan. Pleadings, 84.

White *verſus* Huſſey & al'.

Caſe 12.

THE plaintiff and defendant *Huſſey* were truſtees in a term for 99 years, for raiſing a ſum of money, and *J. S.* who had the reverſion, ſettled it * upon the defendant *Huſſey* and his heirs, in truſt for his mother (who had conveyed it before to him) for her life, and after her death, if he ſurvived her, then in truſt for him and his heirs; but if ſhe ſurvived him, then to her and her heirs. Ten years after, *White* lends a ſum of money to *J. S.*

2 Eq. abr. 478, c. 2. S. C. 2 Chan. Ca. 46.

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(having had no notice of this ſecond conveyance to *Huſſey*) and takes a mortgage of theſe lands to truſtees; *J. S.* dies, his mother ſurviving him: then *White* ſets up his mortgage, and exhibits his bill againſt the mother of *J. S.* and the defendant *Huſſey*, to ſet aſide the former conveyance made by *J. S.* as being voluntary and fraudulent againſt him, and that therefore the term of 99 years might be wholly aſſigned to him, and he thereby enabled to raiſe the truſt money, and his own mortgage money too; the mother anſwers and ſwears, that before her conveying the eſtate to *J. S.* her ſon, it was agreed between them, that he ſhould make ſuch re-conveyance, and that the ſame was not made privately, or kept ſecret, nor was upon any truſt, and that ſhe knew nothing of *White*'s lending any money to her ſon.

White proceeds no farther upon this bill. The mother makes her will and deviſes this land to *Huſſey* and another of the defendants for payment of debts and legacies: then *White* exhibits a new bill to the ſame effect, againſt them, who made the ſame anſwer the mother had done before, *viz.* ſetting forth her anſwer, and that they believed it to be true.

Upon the hearing of the cauſe, the court unanimouſly decreed for the plaintiff, tho' it was ſtrongly inſiſted by the defendants counſel that they could not ſo do without directing a trial at law, whether the ſettlement on *Huſſey* were fraudulent or not, for that fraud or not was triable only by jury (eſpecially where the fraud, if any, was only from its being voluntary) and that if at law the jury ſhould find the fact ſpecially, and ſubmit it to the court, they could make no * judgment upon it; but it muſt be expreſsly found by the jury to be fraudulent or not. But the commiſſioners were all of opinion they might decree a conveyance to be fraudulent, merely for being voluntary, and that without any trial at law: and ſo they did in this caſe.

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Not neceſſary to ſend it to be tried at law, Whether a voluntary conveyance be fraudulent or not? For a court of equity can determine it.

Martin *verſus* Long. Caſe 13.

Eq. Abr. 192, pl. 9. S. C. 2 Vern. 151. S. C. Caſes T. T. 228. Fearne's Cont. Rem. 355.

A Man deviſed a term for years to *J. S.* his heirs, executors, and aſſigns for ever, but if he died before 21, leaving no iſſue, then to *J. D.* The deviſee died before 21, without iſſue, and the remainder was held to be good.

A deviſe of a term to *A*, his heirs, executors, and aſſigns for ever, *but if he die before* 21 *without iſſue, remainder over this remainder is good.*

Claxton *verſus* Claxton. Caſe 14.

Gilb. Can. 338. S. C. 2 Vern. 152. S. C. Eq. abr. 400, pl. 7. S. C.

MR. *Claxton* had made a jointure to his wife of ſeveral lands in *Suffolk*, and after made his will, and thereby deviſed theſe lands to the plaintiff and his heirs, upon condition to pay ſeveral ſums of money to ſeveral perſons at ſeveral days; and if he fail, then to *A.* and his heirs upon the like terms, and dies.

Equity will permit a deviſee of lands, upon condition to pay ſeveral ſums of money, at a ſtated time, to cut down timber for that purpoſe, during the life of a jointreſs.

Some of the money being near due, and the plaintiff not having ready money, and fearing to loſe the eſtate, exhibited his bill againſt the jointreſs, and thoſe that were to come in upon his default, and pray'd that he might be admitted to fell timber off the eſtate, to pay the money; and the court without difficulty decreed it accordingly.

16 *DE

Termino S. Hillarii, 1690.

In Curia Cancellariæ.

Case 15.

Tay *verſus* Slaughter.

27 *January.* Tenant in tail without levying a fine, or ſuffering a recovery, may appoint to a charity, which ſhall bind him in remainder.

TENANT in tail ſettles lands for a charity, and in 1652 a decree was made by the commiſſioners of charitable uſes for applying theſe lands to the charity; then the eſtate tail is ſpent, and *Tay*, who was the remainder man in fee, and an infant, put in exceptions to the decree, that he ought not to be bound by the decree, not coming in under the tenant in tail.

But all the commiſſioners were of opinion that all appointments of tenant in tail to a charity, are by the ſtatute good and binding againſt the remainder man, as well as againſt the iſſue in tail; and therefore confirmed the decree with coſts.

Case 16.

Wheeler *verſus* Newton.

2 Eq. Caſes, 44, c. 5. S. C. more fully reported. Gilb. Can. 245. S. C.

Sealing not neceſſary to bring an agreement out of the Statute of Frauds.

THE plaintiff had articled with the defendant for the purchaſe of ſome lands of his wife's, and the articles were in writing, and ſigned by the parties, but not ſealed; but the plaintiff was put into poſſeſſion of ſome part of the land; and therefore the court * decreed an execution of the agreement, tho' it

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were not under ſeal. And my Lord Commiſſioner *Rawlinſon* ſaid, that agreements in writing, tho' not ſealed, have ſome better countenance ſince the Statutes of *Frauds and Perjuries* than they had before.

Fairbeard *verſus* Bowers and Foxcraft, & econt'. Caſe 17.

2 Vern. 202. S. C. Eq. abr. 143, pl. 15. S. C. Ib. 152, pl. 4. S. C. Caſes temp. Talb. 156. S. C. cited. 1 Atk. 294.

A voluntary judgment given by a freeman of *London*, payable three months after his death, to be poſtponed to debts by ſimple contract, and to the widow's cuſtomary part, *but will bind the freeman's legatory part.*

BOWERS being a freeman and citizen of *London*, and having three baſtard children by the plaintiff *Fairbeard* (which children were likewiſe plaintiffs in the cauſe) about two years before his death gave a bond of 1000*l.* to the plaintiff, *Fairbeard*, conditioned for payment of 500*l.* within ſix months after his death, to be equally divided between the three children, and after confeſſeth a judgment upon that bond defeazanced in the ſame manner, and dies inteſtate. The defendant *Bowers*, who was his widow, took out adminiſtration to him.

This bill was exhibited againſt her and *Foxcraft*, who was creditor of the inteſtate's eſtate, to have a diſcovery of aſſets, in order to ſubject them to the judgment. And *Bowers* had a croſs bill againſt *Fairbeard*, *&c.* to be quieted in the enjoyment of her cuſtomary part, and to have an injunction againſt the judgment.

As to *Fairbeard*'s bill, ſhe pleaded the cuſtom of *London*, by which ſhe was intitled to a moiety of her huſband's eſtate, after debts and funerals paid, and that ſhe had no other proviſion but that, and that there was no conſideration for the plaintiff's judgment; and being to be paid after *Bowers*'s death, it was but in nature of a legacy, and demurred to the diſcovery.

In the hearing of theſe cauſes the whole court was of opinion, that there was no conſideration for entering into the bond or judgment (tho' it was urged, that by the ſtatute a man is obliged to provide for his * baſtard children) and therefore being to be paid after *Bowers*'s death, they reckoned it to be in nature of a legacy, and that all *Bowers*'s debts, and the widow's cuſ- 18

tomary part, ſhould take place before it (but my Lord Commiſſioner *Rawlinſon* ſaid he thought the judgment ſhould be paid before other legacies, if there had been any) ſo they decreed an account of the eſtate and perpetual injunction againſt the bond and judgment, and that it ſhould be ſatisfied out of the inteſtate's cuſtomary part, if ſufficient.

Caſe 17.

Hill *verſus* Moor.

A. puts out 1000 *l.* at intereſt to the *E. I.* company, and takes bond for it in the name of *J. S.* his wife's relation. *A.* becomes a bankrupt; *J. S.* is ſummoned before the commiſſioners before examination; he tells the *E. I.* company, that the money was not his, but that they ſhould pay it to the perſon that brought the bond. *A.*'s wife brings the bond, and has the money paid her. Equity will not relieve againſt it.

THE defendant Sir *John Moor* was a relation to Mr. *Hinton*'s wife, and Mr. *Hinton* had put out 1000 *l.* at intereſt to the *E. I.* company, and taken a bond for it in the name of Sir *John Moor*; after a commiſſion of bankrupts was taken out againſt *Hinton*, and Sir *John Moor* was ſummoned before the commiſſioners to be examined concerning *Hinton*'s eſtate, who appeared before them, and deſired a copy of the interrogatories, and time to conſider them, which being granted, Sir *John Moor* before his examination, goes and tells the *E. I.* company, that the bond that was given by them to him for 1000 *l.* was not for his own money, but they might pay it to ſuch perſon as ſhould bring the bond; and upon that *Hinton*'s wife brings the bond and receives the money.

This bill was brought by the aſſignees of the commiſſioners, to enforce Sir *John Moor* to pay the money, but the court would not relieve them.

Caſe 18.

Eccles *verſus* Thawill.

An executor ſhall not redeem a mortgaged term without paying a debt contracted after.

THE court declared in this cauſe, that if a man mortgages a term, and afterwards becomes otherwiſe indebted to the mortgagee, and dies; his executors * or adminiſtrators ſhall never redeem, without paying the other debts contracted after the mortgage; but if they had been contracted before, they would have been intended to be included in the mortgage. *Per Rawlinſon.*

Kingdome

In Curia Cancellariæ.

Kingdome *verſus* Boakes. Caſe 19.

1 Vern. 161. 2 Ch. Ca. 8. 2 Atk. 19. 3 Atk. 407.—*contrà*, 2 Atk. 140 †.

THE bill was to diſcover, whether the defendant, who was a purchaſer of lands, had not notice of the plaintiff's title before his purchaſe; the defendant by his anſwer poſitively denied the notice; and the plaintiff proved it by one witneſs only. And it was held by the court, that one ſingle witneſs againſt the defendant's poſitive oath in his anſwer, is not ſufficient to ground a decree. So the bill was diſmiſſed.

One witneſs againſt the defendant's anſwer, not ſufficient to ground a decree on.

Sir Edmund King *verſus* Withers, & econt'. Caſe 20.

Gilb. Can. 245. S. C.

WITHERS being a ſcrivener employed by Sir *Edmund King*, did propoſe to him a ſecurity for 800 *l.* which was the eſtate of one *Billingſly*, and the title was carried to counſel to peruſe, who approved the title, if *Billingſly*'s wife had ſuch a jointure made her of other lands, as would bar her dower, and directed *Withers* to enquire, and ſatisfy him of that matter. *Withers* never made any enquiry, or at leaſt never gave any anſwer to the counſel, but told Sir *Edmund* that *Billingſly* was a very honeſt man, and ſo prevailed on him to lend the money; *Billingſly* died, and his wife appeared to have a jointure of thoſe mortgaged lands. *Withers* purchaſed in the jointreſs's title; and when the plaintiff clamoured and made loud complaints againſt *Withers*, that he was like to loſe his money by his means, and expoſtulated the matter ſharply with him at Sir *Edmund*'s counſel's chamber, *Withers*, to appeaſe him, agrees to aſſign the jointreſs's eſtate in the firſt place, to ſatisfy the plaintiff money, *&c.* and immediately reduced the agreement into writing himſelf, * and executes it by ſealing; but he afterwards refuſing to make it good,

A ſcrivener who was employed to examine into a title, fails in his duty, by neglecting to make a thorough inquiry, *&c.* whereby his client is a ſufferer: afterwards the ſcrivener agrees to make him ſatisfaction another way. This agreement decreed in ſpecie, though urged that there was no conſideration.

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† In a modern authority, it was held, that the evidence of one witneſs, corroborated by circumſtances, though to facts denied by the anſwer, was ſufficient to found a decree. Brown's Rep. 52. *Pember & Ux.* v. *Mathers.*

This bill was brought to compel him to it, and his croſs bill was to ſet aſide the agreement, for that it was without conſideration, and he threatened and frightened into it, and that he was not aware what he did when he did it: but the court diſmiſſed his croſs bill, and decreed the execution of the agreement.

Caſe 21.

2 Eq. abr. 635, c. 1. S. C.

A policy of inſurance being made an ill uſe of, the court decreed it to be delivered up.

Wittingham *verſus* Thornborough.

THORNBOROUGH and others came to the inſurance office, and bought a policy for the inſuring the life of one *Harwell* (upon whoſe life they had no concern or intereſt depending) for a year; and the policy ran, whether intereſt or not intereſted; and the *premium* 5 *l. per cent.* and they took this way to draw in ſubſcribers. They agreed with one *Marwood*, a known merchant upon the *Exchange*, and a leading man in ſuch caſes, to ſubſcribe firſt; but in caſe *Harwell* died within the year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other ſubſcribers.

Upon the credit of *Marwood*'s ſubſcribing, ſeveral others (who had inquired of *Marwood* about *Harwell*, who was his neighbour) ſubſcribed likewiſe. *Harwell* lived four months, and then died, and this bill was exhibited to be relieved againſt this policy; and this matter being all confeſſed by anſwer, the court decreed the policy to be delivered up, and the *premium* to be repaid, the plaintiffs deducting thereout their coſts.

The court ſaid, this way of inſuring, was firſt ſet up for the benefit of trade, that when a merchant happened to have a loſs, he might not be undone by it, the loſs by this way being borne by many; but if ſuch ill practices were uſed, it would turn to the ruin of trade, inſtead of advancing it.

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Caſe 22.

A perſon dies inteſtate, leaving one child: the whole perſonal eſtate belongs to him, within the Statute of Diſtributions.

* Palmer *verſus* Garrard.

THE caſe was, *A.* died inteſtate, leaving iſſue only one child, an infant; adminiſtration was committed to *J. S.* during the minority of the infant, who died within a month after age; the plaintiff took out adminiſtration *de bonis* of *A.* the father, and brought this bill againſt the defendant, who had taken out

out adminiſtration to the infant to have an account of the perſonal eſtate of *A.*

The defendant pleaded the Statute for Diſtribution of Inteſtates Eſtates, that thereby the whole perſonal eſtate of *A.* became veſted in the infant, and ſo belonged to the infant as his adminiſtrator, and ſo he not accountable. And the only queſtion was, Whether the ſtatute did extend to this caſe, there being no perſons to ſhare the eſtate, but one to have the whole?

All the court were clear of opinion that it did, and allowed the plea, notwithſtanding it was ſaid that a cauſe had been decreed to the contrary in the Exchequer.

† Rives *verſus* Rives, & al'.

Caſe 23.

2 Eq. abr. 223, c. 2. S. C. Poſt 44.

What proportion tenant for life ſhall bear of incumbrances on the eſtate.

THE caſe was, *G. Rives* made a ſettlement of his eſtate upon himſelf for life, then to truſtees for 99 years, for raiſing 500 *l.* apiece for his three nieces, to be paid at their reſpective ages of 21 years, and after to the plaintiff for life, with remainder to his firſt ſon in tail, with divers remainders over. The plaintiff's bill was to be let into the poſſeſſion of the eſtate, paying his proportionable part of the 1500 *l.* that was charged upon it, 500 *l.* of which was due in preſent, and the reſt not in ſeveral years.

The court decreed, that the plaintiff's eſtate for life ſhould bear 700 *l.* and the remainders the other 800 *l.* and that he ſhould be let into poſſeſſion, paying the 700 *l.* but if the other 800 *l.* ſhould, according to the *limitations of the truſt, become payable, during the plaintiff's life, he was to pay it; but then the term for 99 years, was to be his ſecurity to reimburſe him again. 22

† As to the proportion tenant for life ſhall bear with the remainder man in reſpect of the payment of fines and renewals, vide *Nightingale* v. *Lawſon*, Brown's Reports, 440.

DE
Termino Paſchæ,
1691.
In Curia Cancellariæ.

Caſe 24. Moor *verſus* Rycault.

Poſt 101. Gilb. Ch. 275. 2 Eq. abr. 51, c. 1. 478, c. 3. S. C. 2 Atk. 417.

A husband who had made no proviſion on his wife, agrees that her fortune, which was in truſtees hands, ſhould be laid out in a purchaſe of lands. This agreement, though after marriage, *not to be conſidered as voluntary*, ſo as to be ſet aſide in favour of a creditor of the huſband.

A MAN ſteals a young woman who had a conſiderable portion, which was in truſtees hands: after the marriage, her friends would not part with the portion, unleſs the huſband would give ſecurity that it ſhould be ſettled for the benefit of his wife; and it was agreed that it ſhould be laid out in land, to be ſettled to the huſband and wife, and the heirs of their bodies; and a judgment was given by the huſband for this purpoſe.

Now this bill was exhibited by a creditor of the huſband, for that it was after marriage, and voluntary, and ſo ought not to prevent a creditor of his debt.

But the court would do nothing in it, for that if the huſband himſelf had exhibited a bill here againſt the truſtees for the portion, the court would not have * decreed it to him, without making ſome ſuch ſettlement; ſo the bill was diſmiſs'd, but without coſts.

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Symonds

In Curia Cancellariæ.

Symonds *verſus* Rutter. Caſe 25.

2 Vern. 227. S. C. Eq. abr. 274, pl. 7. S. C. Gilb. Can. 248.—*è contrà*, Poſt 400. Poſt 543. Brown's Rep. 223. S. C. cited †.

THE caſe was this, upon the marriage of a Woman, 500*l.* of her portion, was put into Sir *Francis Child*'s hands, upon articles to this effect, *viz.* that the money ſhould remain in Sir *Francis*'s hands, at intereſt, to be laid out in land, by the conſent of the huſband and wife, and the ſurvivor, and the land to be ſettled on the huſband and wife, and the heirs of their two bodies, the remainder to the heirs of the body of the wife, remainder to the wife's brother, *&c.* and that till a purchaſe had as aforeſaid, the intereſt ſhould be paid to the huſband and wife, and the ſurvivor of them, and the aſſigns of the ſurvivor. The wife dies without iſſue; then the huſband dies: the brother and adminiſtrator of the wife brings this bill to have the money inveſted in land, purſuant to the articles.

By marriage articles agreed, that 500*l.* the wife's portion, ſhould be inveſted in a purchaſe of lands, to be ſettled on huſband and wife for their lives; remainder to the heirs of their two bodies; remainder to the heirs of the body of the wife; remainder to the plaintiff, the wife's brother, in fee. The wife dies without iſſue, and then the huſband dies, the 500*l.* not being laid out. *Per Trevor* and *Rawlinſon*, this money is not to be conſidered as lands; but *per Hutchins* it is, and to go to the perſon to whom the fee is limited, and not to the executor of the huſband.

But the court, *viz. Trevor* and *Rawlinſon*, were of opinion, that the money ſhould not be laid out in land, but ſhould go to the adminiſtrator of the huſband, for that there was no child nor creditor in the caſe; that they did not take it to be the primary intent of the articles, to have land purchaſed, there being no expreſs agreement to purchaſe, but only that it might be purchaſed, if the huſband and wife ſhould elect and agree to have it ſo.

But *Hutchins* was of a contrary opinion; he thought the intent of the parties was, that land ſhould be purchaſed, and that for the remainder man, the court ought to decree it, and relied on the caſe of *Annand and Honeywood*, *Withwick and Jermy*, *Attwood and Kettleby*, formerly adjudged in this court. 1 Vern. 298. 471.

† In a modern authority (*Pulteney* v. *Lord Darlington*) referred to as above, all the numerous caſes are cited on both ſides of the queſtion, and particularly well claſſed and arranged in an elaborate argument of Mr. *Hargrave*, in behalf of the plaintiff. As the caſes are ſo extremely well arranged, and to be found in Mr. Brown's Reports (page 227) it is unneceſſary to refer to them in the margin.

24

Caſe 26.

* Sir Robert Brooks *verſus* Lady Brooks, & al'.

2 Eq. abr. 144, c. 1. S. C. Where the huſband may be plaintiff againſt his wife in equity.

SIR *Robert Brooks* was plaintiff againſt his lady and others, and a motion was made to have her committed, for not anſwering interrogatories, but the court would not grant it, and declared a man could not be plaintiff in this court againſt the wife. On *Saturday* following this matter was moved again, and then the court was of opinion, that tho' a man could not have a bill againſt his wife for diſcovery of his own eſtate; yet, where before marriage ſhe enters into articles concerning her own eſtate, ſhe has made herſelf as a ſeparate perſon from her huſband, and therefore ſhe was ordered to anſwer in a week's time.

*DE 25

Termino S. Trinitatis,

1691.

In Curia Cancellariæ.

Burwell *verſus* Harriſon.

Caſe 27.

2 Vern. 231. S. C.

A. articles with *B.* to make him a leaſe with uſual covenants. *B.* brings a bill to have the leaſe made, he ſhall be at the charges of the repairs, though uſual in that county for the leſſor to be at thoſe charges. *Secus forſan* if *A.* had been plaintiff to have enforced the taking of ſuch leaſe.

THE defendant had entered into articles with the plaintiff, to make him a leaſe of certain lands in the county of *Norfolk* and iſle of *Ely*, with uſual covenants; and the plaintiff brought this bill to have a leaſe made accordingly: and the only queſtion was, Who ſhould be at the charges of repairs? 'Twas proved in the cauſe, that in *Norfolk* and the iſle of *Ely*, the landlord did uſually covenant to repair; that when lands there were let without leaſe, the landlord did uſe to repair; that when the defendant did laſt let part of the lands in queſtion, without leaſe, he was at the charge of all repairs. Defendant pretended that the lands were of a conſiderable better value than the rent reſerved, which was ſo ſmall, in regard it was intended the plaintiff ſhould repair: but no ſuch agreement or mutual intention was proved.

The court were of opinion, that the words *Uſual Covenants* ſhall be intended *uſual* all over *England*, and that the leſſee being plaintiff here to have a leaſe, ſhould be obliged to repair, notwithſtanding the contrary uſage in *Norfolk*, but that the caſe might have * had a different conſtruction, if the defendant had been plaintiff to have enforced *Burwell* to have taken a leaſe. 26

Offley

Case 28.

Offley *versus* Offley.

Coke's Inſt. Harg. ed. 19. a. 185. b. 2 Eq. abr. 465, c. 7. S. C. Barnard. 54. 3 Atk. 347. 1 Vezey, 196. 2 Vezey, 121. 2 Vezey, 277. Brown's Rep. 274.

One ſettles a houſe on his daughter for life, with remainders over, and then by will deviſes the goods and furniture of the houſe to ſuch perſons as were to have the houſe after his death. By the ſettlement, the goods and furniture ſhall go according to the deviſe, and ſhall not be under the power of the firſt taker to diſpoſe of, nor ſubject to her or her huſband's debts.

THIS cauſe came on amicably, and the queſtions propoſed were, 1*ſt*, *John Crew* owner of *Crew Hall*, had ſettled the ſaid houſe by deed executed in his life, ſo that after his death it would go to his daughter for her life, with ſeveral remainders over; and by will deviſed all the goods, furniture and ornaments in *Crew Hall*, to *ſuch perſons as the ſaid houſe was to go to after his death, by virtue of that ſettlement.* The daughter marries Mr. *Offley*, who dies, not leaving perſonal eſtate ſufficient to pay his debts; and the queſtion was, Whether by this deviſe, the daughter had the abſolute property in the goods at *Crew Hall?* for if ſhe had, then by the intermarriage they became Mr. *Offley*'s, and would be liable to the payment of his debts: but the court were of opinion, that ſhe ſhould have but ſuch an intereſt in the goods as ſhe had in the houſe, *viz.* the uſe of them for her life, and that nobody ſhould have an abſolute property in them but he that had an abſolute property in the houſe, by the apparent intent of the deviſor.

2 Wms. 82. 341. 3 Wms. 355. 1 Atk. 269.

Term raiſed to pay 200 *l. per Annum* pin-money to the wife, with covenants from the huſband for payment of it. A year's arrear at the huſband's death held ſuch a debt as ſhould be charged on his truſt eſtate ſettled for payment of his debts.

The 2*d*, Doubt was on the marriage of Mrs. *Offley* with her huſband; there was a term created for raiſing 200 *l. per annum* for her pin-money, which money had been conſtantly paid to her by her huſband's ſteward, except only the laſt year before his death, which was in arrear; and in the ſettlement was a covenant on the part of the huſband for the payment of it: and the court were of opinion, that this being an arrear only for one year, and there being a covenant for the payment of it, ſhould be ſuch a debt as ſhould be charged on his truſt eſtate. *Secùs* if it had been in arrear for many years.

1 Eq. abr. 66. 2 Atk. 104. Poſt 44. 578. 1 Wms. 730. 2 Atk. 78. 3 Atk. 358. 369. 393. 438.—*contrà*,

27

Jewels and chamber plate, bought out of pin-money, allowed the wife as her paraphernalia.

* 3*dly*, Whether Mrs. *Offley* ſhould have her jewels and chamber plate, as her paraphernalia? 'Twas ſaid that the jewels and

plate had been bought with her own pin-money, and that the value of them all together did not amount to above 500*l.* So the court decreed them, being of ſo ſmall value, in reſpect of her huſband's eſtate.

3 Atk. 119. 600*l.* allowed for funerals, in reſpect of the teſtator's quality, and being buried in his own country.

4*thly*, There had been 600*l.* laid out in Mr. *Offley*'s funeral, which the court decreed ſhould be a debt to effect the truſt eſtate, Mr. *Offley* being a man of a great eſtate and reputation in his country, and being buried there; but if he had been buried elſewhere, it ſeemed his funeral might have been more private, and the court would not have allowed ſo much.

Antè, 14. Where the ordinary profits of a term are not ſufficient to raiſe a portion, timber may be felled, or a mine worked for it againſt the heir.

5*thly*, In Mr. *Offley*'s marriage ſettlement there was a term for raiſing 10,000*l.* for a daughter, but it was ſo ſhort that the ordinary profits of the land would not raiſe above half the ſum; but there was a coal-mine in the land, which was open at Mr. *Offley*'s death, which the court ordered ſhould be wrought, and the truſtees to have power to make ſoughs and drains in any other the lands of the heir, as need ſhould require, ſo as it were done in an orderly manner, ſo that the money might be raiſed. And my Lord Commiſſioner *Hutchins* ſaid, that in ſuch caſe where the uſual profits of the land will not raiſe the money appointed within the time, this court may order timber to be felled off the land to make it up.

Sadd *verſus* Carter.

Caſe 29.

2 Eq. abr. 370, c. 6. S. C. Deviſe of lands to *A.* for life, remainder to ſuch child or children as ſhould be living at his death, and to their heirs, *A.* paying 40*l.* to *B.* This is a charge not only on *A.*'s eſtate for life, but alſo on the remainder.

LANDS were deviſed to the defendant *Carter* and his wife for their lives, and after their deceaſe to ſuch of their children as ſhould be living at the death of the ſurvivor of them, and to their heirs, equally to be divided between them, he the ſaid *Carter* paying 40*l.* to the plaintiff, *&c.* at a certain time.

* The court decreed the land to be ſold for payment of the money, and then the defendants to have ſuch a proportion of the overplus of the purchaſe-money as was anſwerable to their intereſt for life in the land; for the money deviſed is a charge upon all the eſtates. 28

Maw

Caſe 30.

Maw *verſus* Harding.

2 Vern. 168. 233. S. C. [1 Wms. 25.

The ſon of a dead *Uncle* not intitled to a diſtribution with a living *Uncle*.

A Man dies inteſtate, leaving an *Uncle* and *Uncle*'s ſon, and the only queſtion was, Whether the ſon of the deceaſed *Uncle* ſhould come in for a diſtribution with the living *Uncle*, by the Statute of Diſtributions? And all the court were of opinion that he ſhould not.

Caſe 31.

Freeman *verſus* Freeman.

Eq. abr. 87, pl. 9. S. C. 2 Vern. 233. S. C. more fully ſtated.

A Man enters into bond, that his ſon, who was tenant in tail, ſhall not alien, and dies; the ſon ſuffers a common recovery, and thereupon the bond being put in ſuit, the bill was brought for relief, but was diſmiſs'd with coſts.

D E.

*DE 29

Termino S. Mich.

1691.

In Curia Cancellariæ.

Caſs *verſus* Waterhouſe.

Caſe 32.

26 *October.*

2 Eq. abr. 687, c. 1. S. C. Poſt 575.

A particular writing for the purchaſe of an eſtate, no writing within the Statute of Frauds, unleſs the party purchaſed by it, or that it was ſhown him at the time of purchaſe; ſo that if that contains more than the words of the conveyance will in ſtrictneſs carry, the purchaſer cannot compel a ſpecifick execution of the reſidue on the particular.

THE caſe was, *Waterhouſe* the defendant was poſſeſſed of ſeveral houſes as executrix to her huſband, for ſeveral terms of years, and which were in mortgage at the time of his death; and there were likewiſe two other houſes which the huſband had purchaſed for years in his own and his wife's names, which were not in mortgage at his death; after the death of the huſband, the defendant his executrix gave out particulars, wherein are contain'd, as well the houſes not in mortgage, as thoſe that were in mortgage, in order to ſell them, and were ſhown the plaintiff *Caſs*, who had been much intruſted and adviſed with in all concerns of the family.

Other purchaſers not bidding enough, *Caſs* himſelf, who was a creditor of the huſband, comes to an agreement with the defendant for the purchaſe of all the houſes, and it was pretty evident in the caſe, that all the houſes were taken by plaintiff and defendant to have been in mortgage; and that the defendant was not appriſed that ſhe had any title to any of them in her own right, and * upon 30 the plaintiff's agreement there was a conveyance executed of the houſes,

houſes, but by the words of it, it was reſtrained to ſuch as were in mortgage.

Afterwards, the defendant being adviſed, that the houſes which were purchaſed in her huſband's name and hers, came to her by ſurvivorſhip, and were not liable to his debts; and that not being in mortgage, they were not conveyed to the plaintiff, ſhe refuſed to let him have them, tho' it appeared in the cauſe ſhe had often ſaid ſhe had ſold them, as well as the reſt, to the plaintiff, and he had paid the taxes for them; ſo this bill was brought to have the houſes conveyed, and to have a farther aſſurance of the others according to a covenant.

But the bill was diſmiſſed, as to all but the making farther aſſurance; for though the court ſeemed ſatisfied, that the defendant had covenanted to convey all to the plaintiff, and thought ſhe had ſo done, yet there being no agreement in writing, as to the two houſes not compriſed in the conveyance, the Statute of *Frauds and Perjuries* ſtood ſo full in their way, that they could not decree the conveying of them; for though the particular were in writing, and theſe two houſes mentioned in it, as well as the others; and though it was proved, that that particular was ſhewed to the plaintiff, yet it was not proved to have been ſhewn to him on his purchaſe, nor that he purchaſed by it.

Caſe 33.
27 *October.*
Eq. abr. 320, pl. 2. S. C.

Bentham *verſus* Haincourt.

A. mortgages to *B.* and after to *C.* then *B.* enters, and after ſuffers *A.* the mortgagor to receive the profits for ſeveral years, without requiring intereſt. This intereſt ſhall not be charged on the lands to keep out *C.*

IT was held by the court in this caſe, that if a mortgagee after notice of a ſubſequent mortgage joins with the mortgagor in ſale of the lands to a ſtranger, the money received by either for the purchaſe, ſhall ſink ſo much of the purchaſe money: and in this caſe the mortgagor being ſon-in-law to the mortgagee, and he having entered, and afterwards ſuffered the mortgagor * to take the profits for ſeveral years, without requiring intereſt,

The court held, that the lands in the hands of the ſecond mortgagee ſhould not be charged with any intereſt for that time,

time, that is, that the intereſt of the firſt mortgagee ſhould not affect the lands, ſo as to keep out the ſecond mortgagee longer than he would have him, if the intereſt had been duly paid.

Coningham *verſus* Melliſh.

Caſe 34.
28 October.

Ch. Caſes 196. Eq. abr. 273, pl. 8. S. C. 272. 3. S. P. Caſes temp. Talb. 78. 268. 21 Viner, 199. 1 Atk. 620. 2 Atk. 562.—*è contrà*, 2 Vern. 425. 571. 644. Poſt 162, and marginal references.

J. S. by will deviſed thus. *I give and bequeath unto my couſin* Thomas Melliſh *all that my meſſuage, called the* Star *in* Chicheſter, *to have and to hold, to him, his heirs and aſſigns for ever, in truſt, to be ſold for the payment of all my debts and legacies within a year after my death*, and makes *Thomas Melliſh* his executor. The plaintiff was couſin and heir to the deviſor, and ſought by this bill to make the ſurplus after debts paid a truſt for him.

Deviſe of lands to his couſin A. and his heirs in truſt, to be ſold for payment of his debts and legacies, and makes A. executor; the ſurplus after debts and legacies no reſulting truſt for the heir, as it would have been on a like caſe, on a conveyance executed.

Rawlinſon and *Hutchins* being only in court, the latter held clearly, it was no reſulting truſt, the former doubted.

Afterwards, *Friday* the 30th inſtant, the caſe was again debated; the argument to make *it a reſulting truſt* was, that *upon a conveyance executed, it would have been ſo, and there could be no reaſon why, being by will ſhould alter the caſe.*

Poſt 541. Brown's Rep. 88, 89, 90.

The argument againſt it was, that 'tis plain the teſtator had a regard and kindneſs for *Thomas Melliſh*, his *couſin* (as he calls him, in his will) who was as near of kin to him as the plaintiff, that is, his heir; but if the ſurplus of the land ſhall be conſtrued to reſult to the heir, the conſequence would be, that *Thomas Melliſh* the executor ſhould have nothing but his labour for his pains; for if there be a reſulting truſt for the heir, the perſonal eſtate muſt, by the rules of this court, be * in the firſt place applied towards payment of the debts in eaſe of the lands, and ſo *Thomas Melliſh* would not have any thing, either as executor or deviſee.

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Wherefore the ſaid two Commiſſioners held it no reſulting truſt, but decreed the heir to join in ſale of the land.

Vernon

Caſe 35.

Vernon *verſus* Jones.

2 Vern. 241. S. C. Eq. abr. 410, c. 10. S. C. 2 Freeman, 117. S. C. 2 Wms. 334. 3 Atk. 805. S. C. cited †.

One by will deviſes lands to truſtees in truſt to pay 200 *l. per ann.* rent-charge to his wife for life, for her jointure, and other legacies and charges thereout. After which he and his wife join in a mortgage for raiſing 8000 *l.* and levy a fine accordingly, and he executes a deed of truſt to ſell for payment of debts, and the ſurplus to be to him and his heirs; yet after his death all this held no revocation, but only *pro tanto*, ſo that the wife allowed to come in for her 200 *l. per ann.* and the other legacies and charges to take place, if ſufficient, if not, in proportion.

SIR *Thomas Vernon* had mortgaged his eſtate for years, and then married, and afterwards made his will, and deviſed all his lands to truſtees upon truſt to ſell (except his capital meſſuage, *&c.*) to pay certain debts, and afterwards to raiſe 200 *l. per ann.* rent-charge, out of the excepted lands, for his wife for life, for her jointure, provided ſhe releaſe her dower; and alſo to raiſe certain portions for his daughters, and a maintenance of 100 *l. per ann.* for his eldeſt ſon, and ſoon after he makes another mortgage for 8000 *l.* and the wife joins in a fine upon this mortgage; and about the ſame time he makes a deed of truſt, whereby he conveys all his lands to ſeveral perſons (who were ſureties for ſome of his debts) in truſt to ſell all or any part for payment of his debts, and that afterwards the ſurplus ſhall be to him and his heirs.

Afterwards Sir *Thomas Vernon* dies without new publication of his will; and the queſtion was, Whether by this mortgage fine and deed of truſt, ſubſequent to the will, that be ſo revoked, or the wife ſo barred, that ſhe ſhall not claim the 200 *l. per ann.* thereby?

It was urged for the plaintiff, that this mortgage and fine ſubſequent to the will, were without doubt a revocation of it in law, and that there was no reaſon why equity ſhould relieve againſt it, and that the deed of truſt made the caſe much ſtronger;
33 for whereas by * his will he had ſubjected his lands (with exception of ſome particulars) to be ſold, for payment of debts, and made thoſe excepted lands a fund to raiſe 200 *l. per ann.* for his wife's fortune: now by this ſubſequent deed of truſt he had ſubjected thoſe excepted lands, as well as the reſt, to be ſold for the purpoſes in that deed, and ſo had deſtroyed the fund upon which the

† In Vernon's Reports, there is a *query* added by the reporter, in reſpect of the deciſion of this caſe, but Lord *H.* affirmed it to be right. 3 Atk. 805.

200 *l.*

200 *l.* was by his will to be raiſed for his wife, and had declared the ſurplus of all, after debts paid, and his truſtees indemnified, to be to himſelf and his heirs: and to obviate any objection which might be made, as if the wife's having a right of dower might be a conſideration for the 200 *l. per ann.* given by the will, and ſo ſhe a kind of purchaſer; it was ſaid, there was a mortgage upon the whole eſtate before the intermarriage, and ſo the wife's title of dower of no conſideration at all, or if it were, ſhe had barred herſelf thereof, by joining in the fine upon the ſecond mortgage.

On the other ſide, it was ſaid, that notwithſtanding the mortgage, which was precedent to the marriage; yet, that being but for years, the wife was intitled to her dower, and would then be intitled in equity to redeem the mortgage on payment of her proportion of the mortgage money; and that the 200 *l. per ann.* was deviſed to her by the will, upon condition, that ſhe ſhould extinguiſh her dower, which ſhe had done by joining in the fine upon the ſecond mortgage, and ſhall be intended to be done in compliance with the direction of the will, and therefore ought not to be turned to her prejudice; that the ſubſequent deed of mortgage and fine, and the deed of truſt being all made for particular purpoſes, ſhall not be intended a total revocation of the will, but only *pro tanto*, and to ſerve thoſe particular purpoſes; and ſeveral caſes were cited to that purpoſe, as the caſe of *Hall verſus Dench* †, which was decreed at the *Rolls*, and after affirmed in court, and was to this purpoſe: A man makes his will, and deviſes * certain lands, and after, mortgages them in fee; yet held that this mortgage ſhall not be a total revocation of the deviſe, but only to let in the mortgagee: and Mrs. *Danby*'s caſe was remembered, where ſhe joined with her huſband in a fine, in making a mortgage, which afterwards did not proceed; then her huſband died, and ſhe brought a writ of dower, and got judgment by default, and the heir could not be relieved againſt it here, as he certainly would have been, if that fine had been a bar of her dower in equity, as it was at law. Some caſes alſo were cited, where even at law ſeveral deeds and acts ſhall be accounted but as one, and therefore it has been adjudged, that where a man has a power to

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† Poſt 514.

* One makes his will, and thereby deviſes certain lands, which he afterwards mortgages. This no total revocation of the will.

revoke uſes by deed, and he levies a fine of the lands, and afterwards declares the uſes by deed, though this fine of itſelf ſingly would have been an extinguiſhment of the power of revocation; yet the deed that comes after ſhall be coupled with it, and be accounted but one act.

All the three Commiſſioners were of opinion, that neither the mortgage and fine, nor deed of truſt, ſhall be a total revocation of the will, being made for particular purpoſes; but that after debts paid, the widow ſhall have her 200 *l. per ann.* and the younger children their portions, if the eſtate were ſufficient to pay all; and if not, to be paid in proportion.

Caſe 36.

Martin *verſus* Woodgate.

13 *November.*
2 Eq. abr. 370, c. 5. 375, c. 27.
Deviſe of the rents and profits of lands till his ſon attain 21 towards payment of debts; and if my ſon die before 21, my debts being paid, then to A. and the ſon dies before 21; yet the rents and profits not only till he would have attained 21, but alſo beyond, till the debts be paid, ſhall be applied for that purpoſe.

A. Deviſes all his goods, chattels, and ſtock to his wife (whom he makes executrix) for payment of his debts, and afterwards deviſes the rents and profits of all his lands to her, till his ſon *J.* ſhould attain his age of 21 years, or marry, towards payment of his debts, and then has theſe words; *and if my ſon die before his age of* 21, *or without iſſue, my debts being paid,* * *then I deviſe to* J. S. *in tail, he paying* 100 l. *to* C. The ſon dies before 21, without iſſue, and the profits to the time the ſon would attain to that age, are not ſufficient to pay all the debts; and the queſtion was, Whether the profits beyond that time ſhould be liable to the debts?

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Rawlinſon and *Hutchins* (who were only in court) held, they ſhould; for upon the whole will, they took it plainly to be the intent of the teſtator, that all his debts ſhould be paid out of his lands: *Rawlinſon* admitted, that if the teſtator had only deviſed the profits till his ſon ſhould be 21, towards payment of debts, and had gone no farther, that it ſhould have been carried no farther, than till the ſon would have attained to that age; but *Hutchins* was of opinion, that even in that caſe the profits ſhould be applied to pay the debts beyond the age of 21, if thoſe to that time were not ſufficient to diſcharge them all.

Raw & Ux' and Eliz. Potts, relict of Leonard Potts *verſus* John Potts.

Caſe 37.

14 *November.*

2 Vern. 239. S. C. Eq. abr. 355, pl. 6. S. C. by the name of *Raw* v. *Pole*.

THE caſe was, *J. Potts*, grandfather of *Leonard*, and of the defendant, 16 *Jac.* 1. ſettled the lands in queſtion, on his eldeſt ſon in tail male, remainder to the heirs male of his body, *&c.* and dies; his eldeſt ſon had iſſue *Leonard* and *John*, and dies; *Leonard*, who, for ought appeared, knew nothing of this intail, married; and on his marriage ſettles theſe lands on his wife for her jointure, and the iſſue of that marriage, without levying a fine, or ſuffering a recovery.

A. tenant in tail, remainder to *B.* in tail. *A.* not knowing of the intail makes a ſettlement on his wife for life for her jointure, which *B.* who knew of the intail, engroſſes; and after the death of *A.* recovered in ejectment againſt his widow; but in Chancery relieved, and a perpetual injunction granted for this fraud in *B.* in concealing the intail, which if it had been diſcloſed, the ſettlement might have been made good.

John, the defendant, who knew of this old intail, and had the deed in his cuſtody, engroſſed his brother's marriage ſettlement, but never made any diſcovery of the intail.

* *Leonard*'s wife dies without iſſue, and he grants a rent-charge out of theſe lands to his brother, which was conſtantly paid; and afterwards marries another wife, the now plaintiff, and ſettles the lands on her, in the ſame manner, as on his former, without fine or recovery. 36

The defendant *John*, likewiſe engroſſes this ſettlement, but never mentions any thing of the old intail; becauſe, as he confeſſed in his anſwer, if he had ſpoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him.

Afterwards *Leonard* and his brother diſagreeing, *Leonard* treats a match for his nephew *Raw*, the plaintiff and his wife, and (having no children of his own) propoſes to ſettle this eſtate upon them, but died without iſſue before the marriage took effect, having firſt made his will, and thereby deviſed his lands after the death of the plaintiff *Elizabeth* to the plaintiff *Raw*, and his heirs. Afterwards the marriage takes effect, and *Raw* ſettles theſe lands upon his wife, and the iſſue of that marriage.

After the death of *Leonard*, the defendant *John* brings an ejectment againſt *Elizabeth*, and by virtue of this deed of intail, evicts her jointure.

Whereupon ſhe, and *Raw*, and his wife, brought this bill to be relieved, and the plaintiff *Elizabeth* was relieved; for it appearing, that the defendant was privy to her marriage, and engroſſed the ſettlement, and at the ſame time knew of the old intail, and did not diſcloſe it, which if he had done, her ſettlement might have been made good and firm in law; therefore the court decreed the defendant to confirm her jointure, and granted a perpetual injunction againſt the judgment in ejectment, but could not relieve *Raw* or his wife, becauſe he was but a voluntary deviſee; and it did not appear that the defendant was privy to that marriage till after the ſolemnization of it, and ſo not guilty of any fraud, as to them; and this decree was afterwards affirmed in the Houſe of Peers.

37
Caſe 37.

* Lumley *verſus* May, & al'.

2 Fq. abr. 514, c. 1. S. C. Poſt. 430.

One deviſes all his goods, chattels, and eſtate whatſoever, on condition to pay his debts and legacies, theſe words paſs his real eſtate, he having by will deviſed a conſiderable legacy to his eldeſt ſon, and other legacies, and the ſurplus of his eſtate after his wife's death to be equally divided between his four children.

Richard May ſeiſed of freehold and copyhold land, ſurrenders to the uſe of his will, and then deviſes to his wife all his goods, chattels, and eſtate whatſoever, upon condition, that ſhe paid his debts and legacies; and by the will deviſed 600 *l.* to the defendant *May* his eldeſt ſon and heir, and 400 *l.* to the plaintiff *Elizabeth* his daughter, and other legacies to other people; and the ſurplus of his eſtate after his wife's death to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his ſon, an infant; the wife dies before probate of the will.

This bill was brought by the creditors and legatees to have the eſtate ſold to pay them, and the court was of opinion, that the words *goods*, *chattels*, *and eſtate whatſoever*, with all the other circumſtances of the caſe, and the perſonal eſtate falling ſhort, would paſs his lands well enough, and decreed a ſale, and the heir to join when he came of age; but he being an infant, they gave him a day to ſhew cauſe after he came of age.

In Curia Cancellariæ.

Scoolding *verſus* Green. Caſe 39.

Eq. abr. 298, pl. 7. S. C.

A Man deviſes 100 *l.* to *A.* and *B.* the two daughters of his brother *Green*, to be paid within a year after the death of his wife, *viz.* 50 *l.* to *A.* and 50 *l.* to *B.* if they ſhall both be alive at the time of payment; but if either of them ſhall die before, then the ſaid 100 *l.* to the ſurvivor of the ſaid two daughters: one of the ſaid daughters died in the life-time of the deviſor, and the only queſtion was, Whether the ſurviving * daughter ſhould have the whole 100 *l.* or only the 50 *l.*?

Deviſe of 100 *l.* to *A.* and *B. viz.* 50 *l.* to *A.* and 50 *l.* to *B.* payable at ſuch a time, and if either die before the time, then the 100 *l.* to the ſurvivor, the whole 100 *l.* decreed to the ſurvivor, notwithſtanding

the ſevering clauſe, which *holds only in caſe both live to the time of payment.*

38

Rawlinſon and *Hutchins* were clearly of opinion, that ſhe ſhould have the whole 100 *l.*; they ſaid, that by the firſt clauſe of the will it is a joint deviſe to them of the 100 *l.* in which caſe, if the will had gone no farther, if one had died, it would have ſurvived to the other; then the *viz.* that comes after, is only a ſeverance of it, in caſe they ſhould both live to the time of payment, which they did not; and then the laſt clauſe of the will, if either died before the time of payment, is a new ſubſtantive deviſe of the whole 100 *l.* to the ſurvivor, and decreed accordingly.

39

De Termino S. Hillarii, 1691.

In Curia Cancellariæ.

Caſe 40.

Foſſet *verſus* Auſtin.

2 Eq. abr. 250, c. 1. 465, c. 6.

Tenant in tail ſuffers a recovery to let in a mortgage of 500 years, and then limits to the old uſes, and by will deviſes all his lands for payment of debts; the equity of redemption of this mortgage held aſſets to ſatisfy creditors, or for a ſubſequent grantee of an annuity.

TENANT in tail ſuffers a recovery to let in a mortgage of 500 years, and then limits the land to the old uſes, and makes his will, and deviſes all his lands for the payment of his debts.

The court thought, that the equity of redemption of this mortgage ſhould be aſſets to ſatisfy creditors, or a ſubſequent grantee of an annuity.

Note; The redemption was limited to him, his heirs or aſſigns.

Caſe 41.

23 *February*.

Holmes *verſus* Buckley.

Eq. abr. 27, pl. 4. S. C.

Baron and feme grant a water-courſe through the feme's lands, with covenants for them, their heirs and aſſigns, to cleanſe and keep it in repair, and ſuffer a common recovery to eſtabliſh the grant. This not a perſonal covenant, as to the baron and feme, but a covenant which runs with the land, and ſhall bind the aſſignees, being made good by the recovery.

Anthony Bottely and *Katherine* his wife, being ſeiſed in right of the ſaid *Katharine*, of two pieces of ground by indenture, 25 *Jan.* 1622, did grant a water-courſe to one *John*

Howland,

Howlana, and his heirs, through the ſaid two pieces of ground; and by that deed did covenant * for them, their heirs and aſſigns, 40
from time to time, to cleanſe the ſame; and that all fines and recoveries levied and ſuffered, and to be levied and ſuffered of the ſaid grounds, ſhould be and enure for the ſtrengthening and confirming the ſaid water-courſe, according to the ſaid grant, and afterwards, the 30th of the ſame month, join in a deed, declaring the uſes of the recovery to be ſuffered of the ſaid ground; and that the ſame ſhould enure to the ſtrengthening and confirming the water-courſe granted by the ſaid indenture of the 25th of *January*.

The water-courſe, by meſne aſſignments, came to the plaintiff; and the ſaid two pieces of ground to the defendant, who built upon the ſame, and much heightened the ground that lay over the water-courſe, and made it much more inconvenient and chargeable to repair, and as it was alledged (and in part proved) the building had much obſtructed the ſaid water-courſe; ſo the bill was, to be eſtabliſhed in the enjoyment of the ſaid water-courſe; and that the defendants, and all claiming under them, might from time to time cleanſe the ſame, according to the ſaid covenants.

It was objected for the defendants, that the ſaid covenant being a perſonal covenant, and made by a feme covert, could in no ſort bind the defendants; and that, though the recovery had made good the grant of the water-courſe, yet that this perſonal covenant was not at all ſtrengthened or bettered by it; and that the plaintiff, and thoſe under whom he claimed, being ſenſible of it, had for 40 years cleanſed the ſame at their own charges.

But the court was of opinion, that this was a covenant that run with the land, and though made by a feme covert, was ſtrengthened and made good by the recovery, and ſaid, though the plaintiff had cleanſed the ſame at his own charge, whilſt it was eaſy to be done, and of little charge; yet ſince the right was plain upon the deed, and the cleanſing made chargeable by the building, it was reaſonable the defendants ſhould do it, and decreed accordingly, and gave the plaintiff his coſts.

41 *DE

Termino Paſchæ,

1692.

In Curia Cancellariæ.

Caſe 41. Cotton *verſus* Cotton and Aſhton.

Poſt 237. 2 Vern. 290. S. C. Eq. abr. 63, pl. 4. S. C. 2 Chan. Rep. 138.

Feme *Ceſtuique Truſt* of a bond marries principal obligor, and after his death the bond being put in ſuit againſt the ſurety, he could not be relieved in equity, becauſe like the caſe where huſband before marriage joins in aſſigning the woman's perſonal eſtate in truſt for herſelf, though urged it was a releaſe in equity, as the obligee's marrying the obligor is a releaſe at law.

THE defendant *Cotton* in her widowhood, lent 200*l.* being part of the aſſets of her firſt huſband *Gibbons* to *J. Cotton*, the plaintiff's ſon, who together with the plaintiff as his ſurety, became bound to the defendant *Aſhton* (in truſt for the other defendant *Cotton* then *Gibbons*) for the repayment of the money. Afterwards Mrs. *Gibbons* intermarried with the principal obligor, who afterwards died, and left his wife wholly unprovided for, and this bond being put in ſuit,

The plaintiff brought his bill to be relieved againſt the bond, for that the *Ceſtuique Truſt* in the bond having intermarried with the principal obligor, that in equity was as much a releaſe and diſcharge of the bond as it would have been at law, if the obligee herſelf had married the obligor; and that the bond being a truſt for her after marriage, was a truſt for the obligor her huſband, and therefore ought not now to be made uſe of.

42 * But the court would not relieve againſt the bond, for they ſaid that the huſband himſelf being one of the obligors, and ſo

privy

privy to this truſt for his wife before marriage, makes it like the caſe where a man joins with the woman he is about to marry, in aſſigning her perſonal eſtate in truſt for herſelf, in which caſe he ſhall not have the benefit of it; or if it ſhould be not ſo taken; yet becauſe the huſband lived with her two years, and was party to the bond, and did not procure it to be delivered up and diſcharged, and was now dead, and had left his wife wholly unprovided for, this court would not hinder her of this means of providing for herſelf.

Batteley & al' *verſus* Cook & al'.

Caſe 42.
2 Vern. 262.
S. C.

Church-wardens having by order of veſtry laid out ſeveral ſums for repairs of the church, and building two new galleries, and having at going out of their office their accounts taken by auditors, and paſſed and allowed by the veſtry, and an order of veſtry for making a rate to reimburſe them, brought a bill againſt the ſucceeding church-wardens to enforce the making ſuch rate; but thoſe church-wardens being likewiſe removed, after examination of witneſſes and publication paſſed, made a good objection at the hearing, for that they had no remedy but in the Spiritual Court, or againſt the pariſhioners in particular who employed them.

PLAINTIFFS were late church-wardens of the pariſh of St. *James*, in *Bury*, *Suffolk*, and during the time of their office, had, by order of the veſtry, expended ſeveral ſums of money in repairing the church, and erecting two new galleries for the uſe of the pariſhioners, and ſeveral ſums of money had, by order of the veſtry, been collected towards reimburſing them, and they had received more than the bare repairs did amount to; but at their going out of their office, their accounts being taken by auditors appointed by the pariſh, and afterwards paſſed, and allowed by the veſtry, there remained due to them 130 *l.* and upwards; and the veſtry made an order, that a rate ſhould be made for reimburſing them that money; and then the ſame veſtry choſe *Cook* and another of the defendants church-wardens for the year enſuing, who refuſing to make any rate for reimburſing the plaintiffs, they brought this bill againſt the ſaid church-wardens, and others of the pariſhioners, to have a rate made purſuant to the * ſaid veſtry order, and to be relieved and paid the money due to them.

After the plaintiffs had examined their witneſſes, and before publication, defendant *Cook* and his partner were removed from being church-wardens, and new ones choſen; and this was objected to the plaintiffs at the hearing of the cauſe.

Hutchins

Hutchins thought it a material objection; but it was anſwered for the plaintiffs, that there could never be any remedy againſt a pariſh in any caſe, for they would be ſure either to remove the old church-wardens and chuſe new ones, or delay the cauſe till their time was out.

Trevor ſaid the charge of the church-wardens would be no objection, if the nature of the caſe were ſuch as the court could give relief in; but the plaintiffs having received as much and more than had been laid out in repairs, as to what remained due to them for the galleries, the court ſaid they would give them no relief, but they muſt take their remedy againſt ſuch particular pariſhioners as had employed them, or elſe in the Spiritual Court. Yet a precedent was cited between *Birch* and *Barſton*, *& al'*, church-wardens of *Lambeth* Pariſh, *Trin.* 2 *W.* and *M.* in this court, where the court decreed the plaintiff, who was late church-warden there, to be paid the money he had laid out for the uſe of the pariſh, with coſts, and then the decree goes on and ſays, for which purpoſe the veſtry of the ſaid pariſh are to take notice hereof (*viz.* of the decree) and ſet a rate accordingly; and what the church-wardens ſhall pay in obedience to this decree, the ſame is to be brought into their accounts, and to be allowed them when they paſs their accounts with the pariſh.

Note; There are the like words in a former decree of *February*, 36 *Car.* 2. *James* and *Rich*, *& al'*, which decree is recited in the decree of 2 *W.* and *M.* and was read at the hearing of the caſe.

44

Caſe 43.

Antè, 21.

An eſtate in mortgage is ſettled on *A.* for life; remainder to *B.* in fee; tenant for life ſhall bear two fifths of the principal and intereſt, and the remainder man three fifths.

* James *verſus* Hailes.

IF an eſtate in mortgage be ſettled on *A.* for life, and then on *B.* in tail, or in fee; tenant for life ſhall bear two fifths of the principal and intereſt, and the remainder man three fifths.

Herbert

Herbert *verſus* Herbert. Caſe 44.

Antè, 27. Eq. abr. 66. 3. Poſt 255. 295. 3 Wms. 337. 339. 2 Eq. abr. 156, c. 4. 5. 1 Atk. 278.

IN this caſe there were ſeveral queſtions concerning a woman's pin-money, or ſeparate proviſion; but the court ordered an account to be taken, and reſerved their judgment till after the account taken.

A feme covert who has pin-money, or a ſeparate maintenance ſettled on her, may by writing, in nature of will, diſpoſe of what ſhe ſaves out of it; and ſuch diſpoſition ſhall bind the huſband.

Note; *Hutchins* cited Sir *Paul Neal*'s caſe, wherein he ſaid it was decreed, that if a woman has pin-money, or a ſeparate maintenance ſettled on her, and ſhe by management or good houſewifry ſaves money out of it, ſhe may diſpoſe of ſuch money ſo ſaved by her, or of any jewels, &c. bought with it, by writing in nature of a will, if ſhe die before her huſband, and ſhall have it herſelf, if ſhe ſurvive him, and ſuch money, jewels, &c. ſhall not be liable to the huſband's debts.

Seymour *verſus* Fotherby. Caſe 45.

Viner (Tit. Payment) 281. 2 Eq. abr. 634, c. 1.

A Man makes a ſettlement of an eſtate on himſelf in tail, and if he die without iſſue, then to truſtees for a term for years, upon truſt, to raiſe any ſum not exceeding 1500 *l.* for payment of his proper debts, which he ſhould owe at his death. Afterwards he borrows 1000 *l.* of *J. S.* and by deed appoints his truſtees to pay that 1000 *l.* out of the truſt eſtate, and dies without iſſue, indebted to ſeveral other perſons; ſo that the 1500 *l.* would not be ſufficient * to pay all; and the only queſtion was, Whether the 1000 *l.* thus appointed to be paid, ſhould be paid in the firſt place, or in proportion with the reſt of the creditors?

A term in truſt to raiſe any ſum not exceeding the 1500 *l.* for payment of debts, he ſhould owe at his death, and after borrows 1000 *l.* and appoints truſtees to pay that 1000 *l.* and dies indebted to ſeveral others, yet the 1000 *l.* to take place according to the appointment,

and not to be divided amongſt all the creditors.

45

The court decreed the 1000 *l.* ſhould be paid in the firſt place,

DE

Termino S. Trinitatis,

1692.

In Curia Cancellariæ.

Caſe 46.

Graham *verſus* Stamper.

Noy's Max. 93, 94. Doct. and Stud. Dial. 2, c. 42. 2 Vern. 146. S. C. Eq. abr. 308, pl. 2. S. C.

A ſervant beſpeaks things for his maſter, and alſo for himſelf, of the ſame tradeſman, how far he ſhall be liable for the goods of his maſter.

A ſervant to King *James* 2. relieved againſt a judgment at law for lace, &c. delivered for the king's uſe, juſt before his abdication, on the circumſtances of the caſe, whereby it appeared the defendant never took the plaintiff in his own perſon to be liable, but had always been paid out of the privy purſe.

THE plaintiff *Graham* was privy purſe to King *James* the Second, and alſo maſter of his buck hounds; the defendant was a laceman, and by his friends made intereſt to the plaintiff, that he may be made uſe of to furniſh lace, &c. for the king's hunt, &c. and was employed accordingly: and *Graham* did likewiſe deal with him on his own private account; and he was from time to time paid for what he furniſhed for the king's liveries out of the privy purſe; but on King *James*'s going away, the defendant brought *Indebitat. Aſſump.* * againſt *Graham*, as well for what he had furniſhed for the king's uſe, as for what he had furniſhed for *Graham*'s own particular uſe, and recovered for both.

This bill was brought, to be relieved againſt that judgment: The court went on theſe circumſtances in the caſe, that *Stamper* had been permitted to furniſh lace and fringes, &c. for the king, on his own deſire and application made to *Graham* on

his

his behalf; that the entries in the day-books of ſuch goods as were delivered for the king's uſe, were without price; that they may be added in the leidger-book higher or lower, as they had a proſpect of ſooner or later payment; that the defendant had from time to time been paid out of the privy purſe, and one witneſs had ſworn that the defendant had ſaid that he expected payment from the privy purſe, and not elſewhere.

That the account of the goods delivered to the king's uſe, had been paid off to about ten months; but the account delivered on *Graham*'s private ſcore was of four years continuance, which ſhews *Stamper* kept them as diſtinct accounts.

That none of the goods delivered for the king's uſe came to *Graham*, nor was there any particular promiſe of his to pay for any of them; and therefore, if the law ſhould be, that he who ſpeaks for or fetches goods for his maſter, without any particular promiſe of paying for them, is liable to pay for them (which they ſeemed to doubt) yet on the particular circumſtances of this caſe, it would be fit to conſider how far uſe ſhould be made of this judgment.

As to the objection, that the damages at law being intire, could not be ſevered and apportioned by this court; the court anſwered, that the defendant had already done that by his anſwer, and the ſchedule annexed to it, having therein ſet forth how much *Graham*'s own proper debt was, and how much for goods delivered for the king; and in doubtful caſes it is moſt prudent * to try their fortunes at law, before they come into this court, and that therefore the proceedings that have been at law ought not to be objected; for if this court cannot relieve after judgment at law, it cannot correct the rigour of the law at all, for till judgment it may be very doubtful what the law is. 47

Trevor ſaid, it was a caſe of great conſequence, but of very little doubt; but becauſe of the great noiſe and diſcourſe that had been made about it, they ordered a maſter to ſtate it on the books, anſwers, proofs and pleadings; and then the court would direct for how much execution ſhould be taken out.

Dickinſon

Caſe 57. Dickinſon *verſus* Molineux.

17 Viner (Tit. Prerogative) 529, 530, 531. Poſt 153, 154, 155.

By an extent in aid, taken out by a ſimple contract creditor againſt himſelf, and the debt found, he preferred himſelf to bond-creditors who had recovered judgment againſt the executor, the executor not relievable in equity. *Sed Quære.*

THE plaintiff's teſtatrix was indebted to ſeveral perſons by ſeveral bonds, *&c.* and to the defendant by ſimple contract; and judgment is recovered againſt the plaintiff upon one of the bonds, the defendant being one of the King's receivers, and bound with ſureties to the King, to anſwer what he ſhould receive; takes out an extent in aid againſt himſelf, and has this ſimple contract debt found, and takes out a *Scire Facias* againſt the plaintiff, and has judgment thereupon in the Exchequer.

Whereupon the plaintiff brought his bill here to be relieved, ſuggeſting that theſe proceedings were fraudulent, and on purpoſe to interrupt the legal courſe of adminiſtration, and to defraud the reſt of the creditors (for there were no further aſſets) that had debts of a higher nature, and to make him pay what had been recovered by them againſt him out of his own pocket; that this extent was not proſecuted by the king, but by the defendant himſelf, and at his charges; and that he * was not really indebted to the king at the time of the extent (though the bond were kept on foot) or that if he were, he or his ſureties were able to pay the king's debt, and ſo that not in danger.

48

The defendant pleaded theſe proceedings in the Exchequer in bar to the plaintiff's relief, but by his anſwer confeſſeth that he had proſecuted the extent at his own charges, and that he was able to pay the king at the time of the extent.

The court allowed the plea, and would not relieve the plaintiff; and yet not long before they had relieved Alderman *Sturt* in caſe of ſuch an extent. *Qu.* Wherein this caſe differs from that, further than that there the creditors were plaintiffs, here the executor.

DE

Termino S. Mich.

1692.

In Curia Cancellariæ.

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† Gibbs *verſus* Herring. Caſe 48.

Poſt 505. 1 Wms. 141. 243. 2 Eq. abr. 452, c. 3. 2 Atk. 159. 3 Atk. 440. with reſpect to a truſt.

An executrix having money in the hands of *J. S.* to a ſhare whereof ſhe was intitled in her own right, intruſts *J. S.* to put it out at intereſt for her, which he does, and the ſecurity proves defective, ſhe ſhall not anſwer the loſs to the other legatees or ſharers.

A. In his life-time intruſts *J. S.* with ſeveral monies of his to diſpoſe of at intereſt; then *A.* dies, part of the money remaining in the hands of *J. S.* undiſpoſed of: the executrix of *A.* deſires *J. S.* to put it out at intereſt, who does ſo, and the ſecurity proves defective.

The executrix ſhall not make it good to the plaintiffs, who were to have a ſhare of the eſtate, by the cuſtom of the province of *York*, but againſt a creditor ſhe ſhould. So it is of goods ſold *bonâ fide* to a perſon who became inſolvent before all the money paid.

Note; She herſelf was intitled to a ſhare of the eſtate as well as the plaintiffs.

† No ſuch caſe appears in the Regiſter's book: the Editor has ſearched for it, but in vain.

Walker

Caſe 49. * Walker *verſus* Penrin.

Mortgagee having received 8 *per cent.* decreed to account for the 2 *per cent.* over value, to ſink the principal; but if principal and intereſt had been overpaid at that rate, no refunding.

IN this caſe it was decreed, that a mortgagee having received 8 *l. per cent.* ſince the year 1660, ſhould account for the 2 *l. per cent.* over value, to ſink the principal mortgage money; but if the principal and intereſt were overpaid, the parties muſt ſhake hands, for there ſhall be no refunding.

Caſe 50. Strode *verſus* Gibbs.

Freeman of *London* gives bond to his mother, to be paid after his death, this ſhall go out of the whole eſtate, and not out of his own cuſtomary part only.

IF a freeman of *London* gives bond to his mother to be paid after his death, this ſhall go out of the whole eſtate, and not out of his own cuſtomary part only.

Caſe 51. † Hale *verſus* Hale.

1 Wms. 246. 342. 486. 2 Wms. 446. 2 Atk. 117. 3 Atk. 203. Barnard. 272. 2 Ch. Rep. 30. 63.

A. conveys a term for years in truſt, to raiſe 1500 *l.* for ſuch child or children as ſhould be living at his death. A poſthumous child held a child living at his death, to take within the meaning of that truſt, which was not to be conſtrued ſo ſtrictly as a limitation at law.

A. Conveys a term for years to *J. S.* upon truſt, to raiſe 1500 *l.* for ſuch child or children of *A.* as ſhould be living at the time of his death; *A.* dies, leaving no child, his wife *enſient* with a daughter, which was afterwards born.

My Lord Keeper declared that this poſthumous daughter is a child living, at the death of *A.* within the meaning of the truſt, and that a direction of a truſt is not to be ſo ſtrictly conſtrued, as a limitation of an eſtate at law. And one *Lutterel*'s caſe was cited in my Lord *Bridgman*'s time, where a bill was exhibited on behalf of an infant in *ventre ſa mere* to ſtay waſte, and an injunction granted upon it.

3 Salk. 229. 2 Vern. 710.

† See Coke's Inſtitutes, Harg. ed. 11, b. n. 4.; and Lord Hardwicke's decree in *Elliſon* v. *Ayrey*, 1 Vezey, 114.

*DE 51

Termino Paſchæ,

1695.

In Curia Cancellariæ.

Harriſon *verſus* Forth. Caſe 51.

Eq. abr. 331, pl. 6. S. C. 2 Wms. 494. 1 Atk. 571. 2 Atk. 242.

THE Maſter of the *Rolls* was of opinion in this caſe, that if *A.* purchaſes an eſtate, with notice of an incumbrance, or that it is redeemable, and then ſells it to *B.* who has no notice; who afterwards ſells it to *C.* who has notice; that by this, the firſt notice to *A.* the firſt purchaſer, is thereby revived, and that *C.* the laſt purchaſer ſhall be liable to the incumbrance or redemption, as if it had never been in the hands of one who had no notice.

A. ſells to *B.* who has notice of an incumbrance on the eſtate; *B.* ſells to *C.* who has no notice, and he to *D.* who has notice, whether this revives the firſt notice to *B.*

Afterwards, on appeal to my Lord Keeper, it being urged, that in ſuch caſe an innocent purchaſer without notice may be forced to keep his eſtate, and cannot ſell it, and ſhall be accountable for all the profits received *ab initio*, his Lordſhip held, that though *A.* and *C.* had notice, yet if *B.* had no notice, the plaintiff could not be relieved againſt the defendant *C.* and ordered *C.* to be examined on interrogatories, if he ever ſaw the conveyance from the plaintiff to her ſiſters, and then to be tried if the defendant *C.* paid any, and what conſideration for the ſaid lands; and if *B.* had notice at the * time of his purchaſe that it 52
was redeemable; for if he had not, the plaintiff could not be relieved, though *A.* and *C.* had notice.

Caſe 52.

Thompſon *verſus* Towne.

Eq. abr. 242, pl. 6. S. C. 2 Eq. abr. 466, c. 8. S. C. 2 Vern. 319. S. C †.

A. indebted to *B.* 300 *l.* in conſideration of a ſettlement on him by *A.* after his death, gives bond to *C.* in truſt for *A.* to pay 500 *l.* as *A.* ſhould by will direct. *A.* directs the 500 *l.* to be paid to *C.* and makes him executor on his ſuing this bond, and a bill brought by *B.* This 500 *l.* is aſſets in *B.*'s hands to pay what was due to him.

William Thompſon, ſeiſed of the manor of *Boothby*, in *Com. Lincoln*, of about 200 *l. per ann.* (which was charged with a rent-charge of 120 *l. per ann.* for life) and being old and not married in *November* 1687, ſettled the ſaid manor on himſelf for life, and after on the plaintiff *Anthony Thompſon* (who was his near kinſman) and his heirs: and the plaintiff, as the conſideration of the ſaid ſettlement, did at the ſame time give a bond to the defendant, by *William Thompſon*'s direction, and in truſt for him, of 1000 *l.* penalty, conditioned to pay any ſum or ſums of money not exceeding 500 *l.* to ſuch perſon or perſons, and in ſuch manner as the ſaid *William Thompſon* ſhould by his laſt will deviſe and appoint.

William Thompſon was at the time of making this ſettlement, and giving this bond, indebted to the plaintiff in 300 *l.* by bond, and did afterwards become indebted to him in ſeveral other ſums of money, to 70 *l.* and upwards.

In the year 1689, *William Thompſon* makes his will, and reciting the ſaid bond to the defendant in truſt for him, deviſes the 500 *l.* ſecured thereby to the ſaid defendant the obligee, and makes him executor, and directs him to pay 50 *l.* to one *William Diſney* to bind him an apprentice, and 50 *l.* more to ſet him up, and 20 *l. per ann.* to one *Anne Perkins* for life, and in 1692 dies.

Defendant puts the ſaid bond in ſuit againſt the plaintiff, who brought this bill to ſubject this money to be aſſets in his hands to pay the 300 *l.* and 70 *l.* due to him from the teſtator.

53 * The defendant by anſwer inſiſted, that the conſideration of *William Thompſon*'s making the ſaid ſettlement was, that he

† This caſe is thus ſtated in Vernon: *J. S.* on the ſale of lands, takes a bond from the purchaſer to pay any ſum or ſums of money not exceeding 500 *l.* as he ſhould by will appoint: he afterwards appoints payment of it to ſeveral of his relations. Bill was brought by the creditors of *J. S.* for ſatisfaction out of aſſets, and (*inter alia*) to have the 500 *l.* applied towards payment of their debts. *Per Cur.* *J. S.* having power to diſpoſe, the 500 *l.* muſt be looked upon as part of his eſtate, and decreed it to be aſſets liable to plaintiff's debts.

might

might have 500*l.* to diſpoſe of, and that he would not elſe have made the ſettlement, and therefore the ſaid 500*l.* ought not to be aſſets, eſpecially to anſwer the plaintiff's debts; and at the hearing of the cauſe the defendant pretended he had proved that the plaintiff and *William Thompſon* had agreed at making the ſaid ſettlement, that the plaintiff's bond ſhould be delivered up; but theſe depoſitions were oppoſed, and could not be read, becauſe that matter was not put in iſſue by the defendant's anſwer, and the proofs did amount to no more than that *William Thompſon* himſelf had ſaid, that he intended that bond ſhould be delivered up.

My Lord Keeper directed it to be tried at law, whether it were agreed that the ſaid bond of 300*l.* ſhould be delivered up or ſunk; and that iſſue was tried for the plaintiff, *viz.* that it was not agreed, *&c.*

The cauſe coming after to be heard on the equity reſerved, the Keeper decreed the ſaid 500*l.* to be aſſets *to pay the plaintiff's debt*, and that it ſhould go to a maſter to compute what due to him, and he to retain ſo much as to ſatisfy himſelf, and to pay the overplus to the defendant. And on appeal to the Houſe of Lords, this decree was affirmed.

* DE

Termino S. Trinitatis,

1695.

In Curia Cancellariæ.

Caſe 53.

Walſh *verſus* Walſh.

1 Wms. 25. 595. 3 Wms. 50. Eq. abr. 249, pl. 7. S. C. 2 Vezey, 215. S. C. cited, and S. P. Poſt 593.

A. has three brothers, one dies, leaving two children, another three, and the third five; then *A.* dies inteſtate, the diſtribution ſhall be *per Capita*, and not *per Stirpes*, being all next of kin in equal degree.

A. has three brothers, one dies, leaving three children, another two, and the third five, then *A.* dies inteſtate; and *per Lord Keeper*, on time taken to conſider of this caſe, diſtribution ſhall be *per Capita* and not *per Stirpes*; and that all the children ſhould have equal, becauſe none take by way of repreſentation, but all as next of kin in equal degree.

Caſe 54.

Starling & al' *verſus* Ettrick & al'.

Poſt 461, and the note thereto ſubjoined. Coke's Inſt. 28, b. Harg. ed.

Where a perſon may take by the name of heir, though not heir general.

SIR *Samuel Starling*, 4 *January* 1672, conveyed the manor of *S. &c.* to two truſtees and their heirs, upon truſt and confidence that they and their heirs ſhould convey the premiſſes, and every or any part thereof, to ſuch perſon, and for ſuch time, term and eſtate as he the ſaid Sir *Samuel* by any writing under his

his hand and ſeal, in the preſence of two or more credible * witneſſes, or by his laſt will and teſtament in writing, ſhould direct, limit or appoint; and for want of ſuch appointment to the right heirs of the ſaid Sir *Samuel* for ever; and after, by will, dated in *Auguſt* 1673, Sir *Samuel* deviſes ſeveral meſſuages to charitable uſes, and deviſes to the plaintiff *Samuel Starling* the elder, his nephew, ſome houſes in St. *Sepulchre*'s, but he was only to have 50*l.* *per Annum* out of them till his age of 24, and 100*l.* to bind him an apprentice; and if the plaintiff *Samuel* the elder ſhould die before his age of 24, that then the truſtees ſhould convey the ſaid houſes to the right heirs male of Sir *Samuel*; and for default of ſuch heirs male to the right heirs of Sir *Samuel* for ever: and did appoint that the ſaid truſtees and their heirs ſhould within ſix months after *Lady-Day* 1695, convey the manor of *D. &c.* to his nephew *Richard Starling* (who was his heir at law) if he ſhould be then living, for term of his life only; or, if he ſhould be dead, for his heirs male, to hold to him and his heirs male for ever; and for want of ſuch iſſue to his own right heirs for ever. 55

Soon after Sir *Samuel* died, leaving his nephew *Richard* his heir; *Richard* had iſſue *Jane* (married to the defendant *Ettrick*) and died; and it was laid in the bill, that Sir *Samuel* had great diſpleaſure againſt his nephew *Richard*, by reaſon of his extravagancy and bad courſes, and therefore had left him no eſtate till he ſhould be 40 years old, and then only for life; and had often declared, that he would ſettle his eſtate ſo, that if *Richard* died, his nephew *Samuel Starling* ſhould have it; and after this ſettlement and will, had told ſeveral perſons, that he had ſo ſettled it, and the plaintiffs (who were *Samuel Starling* the elder, and *Samuel* his ſon) inſiſted, that either *Samuel* the elder is intitled as right heir male of Sir *Samuel*, or elſe *Samuel* the younger, as heir male of *Samuel* the elder.

* To this bill the defendants demurred, for that it appeared of the plaintiffs own ſhewing in their bill, that they had no title. 56

On arguing the demurrer, it was over-ruled, and defendants ordered to anſwer; but the plaintiffs were not to examine to any

parol diſcourſes of Sir *Samuel Starling*, how he intended to ſettle, or had ſettled his eſtate, without ſpecial leave of the court.

Afterwards the plaintiffs moved the court, that they might have leave to examine to ſuch diſcourſes and declarations of Sir *Samuel*, and inſiſted, that ſuch examination had been in the caſe of the † Counteſs of *Gainſborough* and Earl of *Gainſborough*, and of ‡ *Crompton* and *North*, and ſeveral other caſes; and the parties had been relieved upon ſuch examinations for the expounding and explaining wills; and if the plaintiff could amend his caſe by ſuch examination, then to prevent him of them, would be to debar him of his right; but on the other ſide, if upon the hearing, the examination ſhould appear impertinent, the court could recompenſe the defendant in coſts.

† 2 Eq. abr. 23. pl. 1.
‡ 1 Chan. Ca. 196.

For the defendant, it was inſiſted, that it would be of fatal conſequence to admit examinations of this kind, to carry eſtates, contrary to the words of a will, and what by law they do import, and my Lord Keeper inclined that way, and denied to admit the plaintiffs to examine to thoſe matters.

Afterward the caſe was argued at *Powis Houſe*, and the ſubſtance of what was inſiſted upon by the plaintiffs counſel, was, that this being in the caſe of truſt, and a will ought to have the moſt favourable conſtruction the court can give it; and it is very plain, what Sir *Samuel* intended, *viz.* that his eſtate ſhould be continued in the name, and go to the males of the family; and this is not a limitation of an eſtate, but a direction to the truſtees to make a conveyance; that the word *Heir* is in many caſes, even in legal writs, *&c.* taken for heir * apparent, as the father may have a writ, *Quare Fil' & Hæred. cepit*, &c. which muſt be his heir apparent; and in the caſe of ‖ *Burchet* verſus *Durdant*, where lands were deviſed to the heirs of *J. S.* now living; it was held, that the eldeſt ſon of *J. S.* ſhould take, though in ſtrictneſs of ſpeech, he was not heir during the life of his father, but heir apparent only.

57

‖ 2 Ventris, 311. Fearne's Cont. Rem. 109. 114. 144.

On the other ſide, it was argued, that if this had been a deviſe of the legal eſtate itſelf, it is plain, that neither of the plaintiffs could have taken any thing by it; for it is a known rule in law, that

that whoever will take as a purchaſer by the name of heir-male, muſt be in the ſtricteſt ſenſe heir as well as male, or elſe he cannot take at all; and in the caſe of *Burchet* and *Dardant* the words *now living* altered the caſe, and made it a deſcription of the perſon, and without theſe words, the heir apparent could not have taken, and it would introduce great inconveniencies, if legal inheritances, and equitable inheritances, ſhould not be governed by the ſame rule; and the conveyance being to be made within ſix months after *Lady-Day* 1685; if he is not a perſon capable to take at that time, he can never take at all, and the will cannot, by any proofs, have any ſenſe and meaning put upon it, other or different from what it would have had without theſe proofs, for all the will muſt be in writing.

My Lord Keeper diſmiſſed the bill, and decreed the truſtees to convey to the defendants, according to the will of Sir *Samuel Starling*, they having a croſs bill for that purpoſe.

58

* Parker *verſus* Blythmore. Caſe 55.

3 Wms. 95. 1 Chan. Rep. 174.

In court before the Maſter of the Rolls.

If plaintiff replies to defendant's plea, he thereby admits the plea to be good, if it be true, and the validity of the plea can never after be conſidered, but only the truth of it, as he proves it, or the plaintiff diſproves it.

THE plaintiff had a legal title, but the deed by which he claimed was loſt, and he brought this bill to ſet it up; the defendant anſwered as to part, and pleaded himſelf a purchaſer for a valuable conſideration, without notice, *&c.* The plaintiff replies to the plea, and the defendant proves his plea, and the plaintiff proved no notice upon him; and when the cauſe came to be heard, the Maſter of the Rolls was of opinion, that the plea was good; but the queſtion was, Whether the court could now conſider of that at all, the plaintiff having admitted the plea to be good, by replying to it, and nothing being now in queſtion, but whether it be true or not; and if it ſhould not be ſo, no plaintiff would ever ſet down any plea to be argued, but would reply, and put the defendant to the charge of examining, and then conteſt the validity of the plea at the hearing; and beſides, the defendant would be prevented from making ſuch other defence as he might, by relying on his plea.

59

*DE Termino S. Mich. 1695.

In Curia Cancellariæ.

Case 56.

2 Eq. abr. 395. c. 1. S. C.

Attorney General, at the relation of the Inhabitants of Stains, *verſus* Taylor.

Exemplification of part of a patent not ſuffered to be read in evidence, notwithſtanding the ſtatutes of 3 and 4 of *Edw.* 6. and 13 *Eliz.* where the other ſide have no time to conſult the patent-roll, and ſo may be ſurprized by an imperfect exemplification.

IN this caſe the plaintiff would have read in evidence an exemplification of part of a patent, which was objected to by the defendant, for that nothing but the patent itſelf, or an exemplification or copy of the whole could by law be evidence. Plaintiff's counſel inſiſted, that by the 3d and 4th of *Edw.* 6. *cap.* 4. and 13 *Eliz. cap.* 6. an exemplification of ſo much of a patent as relates to the matter in queſtion, is to all purpoſes of law made of the ſame force, as if the whole patent were exemplified, whereupon the ſtatutes were ordered to be read.

My Lord Keeper was clearly of opinion, that though by thoſe ſtatutes an exemplification of part of a patent be made ſufficient to make a title under, or to be pleaded in any court where the other ſide will have time to reſort to the patent, and to be adviſed, whether the exemplification be of all that is material;

60 and if it * be not, they may take advantage of it; yet they did not extend to authorize the giving ſuch exemplifications in evidence,

evidence, where the other ſide could have no time to conſult the patent-roll, and might be ſurprized and loſe his right by an imperfect exemplification; and cited a caſe, wherein he had known it ſo held in *B. R.* on offering ſuch an exemplification in evidence; and therefore, if the plaintiffs inſiſted upon it being of great conſequence, he would have the opinion of all the judges, before he would admit of it; whereupon the plaintiffs waved it, and produced the patent-roll itſelf, and ſo the cauſe went on.

61

*DE

Termino S. Trinitatis, 1696.

In Curia Cancellariæ.

Caſe 57.

Meynell *verſus* Howard.

Antè, 2. Poſt 99. 477. 2 Eq. abr. 370, c. 9. 591, note. S. C. Caſes temp. Talbot, 54.

Heir of the mortgagor ſhall have the perſonal eſtate applied, in the firſt place, to pay off the mortgage money, though no covenant in the mortgage deed for payment of it, though the perſonal eſtate is deviſed away by the mortgagor to his relations, becauſe it is a debt.

A Man makes a mortgage redeemable upon payment of money, but there is no covenant for payment of the money in the deed; then the mortgagor makes his will, and deviſes his perſonal eſtate amongſt his relations; and the queſtion was, Whether the money on this mortgage be ſuch a debt, as that the perſonal eſtate ſhall be applied towards the diſcharge of it? It was ſaid, that Sir *Edward Moor* had made ſuch a mortgage, and afterwards raiſed a term in other lands for payment of his debts; and the mortgage money was held to be a debt payable out of that truſt.

Cur. So it is here, and the perſonal eſtate muſt diſcharge it.

*DE 62

Termino S. Mich.

1696.

In Curia Cancellariæ.

Ballet *verſus* Sprainger. Caſe 58.

2 Vern. 301. S. C. Antè, 23. Antè, 43.

A Man makes a mortgage, and then deviſes the land to *A.* for life, and the reverſion deſcends to his heir; the tenant for life enters into poſſeſſion, and brings a bill againſt the mortgagee to redeem, and the heir likewiſe brought his bill to redeem; tenant for life did not proſecute his bill, but continued to receive the profits, and about a year before his death, purchaſes in the mortgages in the name of the defendant, and made the defendant executor, and died.

A deviſee for life of mortgaged lands, muſt pay his proportion of the mortgage money.

The heir brought this bill to redeem, and the only queſtion was, Whether the deviſee for life ſhould go away with all the profits received, and the heir be forced to pay off all the incumbrances; or whether any part of the profits received ſhould be applied to ſink the mortgage money?

Lord Keeper. Deviſee for life muſt pay one third of what was due at the death of the deviſor, with intereſt for the ſame, and the heir muſt pay the reſt, and the maſter muſt take the account accordingly; and ſo it would have been, if the mortgagee had received the profits, during the life of tenant for life,

† 1 Vern. 404. Eq. abr. 117, pl. 3. S. C.

life, and a * caſe between † *Clyatt* and *Battſon*, *Trin.* 1686, was cited to that purpoſe.

63

Caſe 59. Cleland *verſus* Cleland.

Eq. abr. 70, pl. 14. S. C. 1 Vern. 7. 2 Vern. 68. 501. 1 Wms. 378. 2 Wms. 608. 3 Wms. 199. 2 Vezey, 676. S. C. cited, and S. P. Poſt 312. 412.

The wife's portion, though out on bond or mortgage, which by law ſurvives to her, ſhall yet in equity be ſubject to the huſband's bond-debts to eaſe the heir, *where a ſettlement is made on the wife*, for that makes the huſband a purchaſer of her fortune, and it ſhall go to his executors; but if the ſettlement were only in conſideration of part of the fortune, then the remaining part out on bond ſhall ſurvive to the wife, unleſs there were an expreſs agreement that the huſband ſhould have it.

PLAINTIFF's grandfather was tenant for life of a farm, and the inheritance was in the plaintiff's father, to whom he is heir, on the marriage of the plaintiff's father with the defendant, who had a portion of 300 *l.* in her brother's hands, and ſecured by his bond to her; the father and grandfather join in ſettling this farm upon the defendant for her jointure; and this ſettlement is expreſſed to be made in conſideration of 100 *l.* paid to the grandfather for the marriage portion of the defendant, which 100 *l.* was paid to him accordingly by her brother.

The marriage took effect, and the defendant's huſband died, indebted to ſeveral bonds, wherein he and his heirs were bound, and actions were brought againſt the plaintiff, as his heir, on the ſaid bonds, to ſubject the real eſtate deſcended to the payment of them; and he brought this bill to have the remaining 200 *l.* of the portion, which was unpaid, applied in diſcharge of theſe debts.

It was pretended by the defendant, that there was but 100 *l.* of her portion to be paid, and that it was agreed by her huſband and herſelf before the marriage, that the remaining 200 *l.* ſhould be hers; and beſides, that her huſband being dead, and this being a debt to her not diſpoſed of by him, it did by law belong to her.

It was pretended by the plaintiff to be expreſsly agreed before the marriage, that the remaining 200 *l.* of her portion ſhould be applied to pay the huſband's debts, if there was occaſion, but neither of the agreements were well proved.

The

* The Maſter of the Rolls decreed the 200 *l.* to be applied towards payment of the huſband's debts, and ſaid it was natural equity it ſhould be ſo, and there being a ſettlement made on the wife, the portion, though it remains a debt to the wife, doth belong to the huſband. 64

An appeal was afterwards brought from this decree before the Lord Chancellor, and he was of opinion, that as this caſe is, unleſs there were an agreement, that the huſband ſhould have the other 200 *l.* it will ſurvive to the wife, and therefore directed it to be tried, whether there were any ſuch agreement or no; but if the ſettlement had been in conſideration of *the whole portion*, and had been equivalent to it, that would have amounted to an agreement, that the huſband ſhould have had it.

Note; There was an objection made in this caſe for want of parties; for that the adminiſtrator of the huſband was not made a party, but the wife being called adminiſtratrix in the bill, and having by her anſwer confeſſed, that ſhe had poſſeſſed the perſonal eſtate, and diſpoſed of it (and being the perſon by law intitled to adminiſtration) though ſhe denied, by anſwer, that ſhe had taken adminiſtration, the court over-ruled the objection.

Bloxton *verſus* Drewit.

Caſe 60.

THE plaintiff had an order to prove a deed *viva voce*; at the hearing it happened, that all the witneſſes to the deed were dead, and the plaintiff produced a witneſs at the hearing to prove their hands, and this he could not be admitted to do; but the maſter of the Rolls put off the cauſe, and gave liberty to examine in the office to prove the deed, notwithſtanding publication paſt.

One having order to prove a deed *viva voce*, at the hearing not allowed to prove the witneſſes hands, they being dead, but had leave to examine in the office, to prove the deed, though publication was paſſed.

Lady

65

Case 61.

* Lady Radnor *verſus* Rotheram.

13 *November.*

Shower's Parl. Caſes, 96. S. C. 4 Rep. 1. Eq. abr. 219, pl. 3. 1 Vern. 356. S. C. 2 Vern. 378. 583. 2 Chan. Caſes, 172. Poſt 97. 151. 336. 1 Wms. 138. 2 Wms. 700. 3 Wms. 229, and note. Caſes temp. Talbot, 138. 2 Atk. 526. Brown's Rep. 326, 327. S. C. cited. Poſt 137.

A dowreſs ſhall not have the aſſiſtance of a court of equity *to ſet aſide a term for years againſt a purchaſer. Secus* of a jointreſs, but againſt an heir at law a dowreſs has been let in.

THIS caſe had been argued by counſel on both ſides, and this day was appointed to give judgment.

The caſe was, Lady *Radnor*'s huſband was ſeiſed in tail of the lands in queſtion, but there was a term for 99 years prior to his eſtate (which was created for the performance of ſeveral truſts in the Earl of *Warwick*'s will, which were all performed, and after to attend the inheritance) he levied a fine, and ſuffered a recovery, and ſold the eſtate to the defendant; but his wife not joining, ſhe, after his death, recovered dower, and brought this bill to have the benefit of the term.

It was ſaid, the huſband ſhould have had the benefit of this term, and dower is the continuance of the huſband's eſtate, and the vendee of the huſband ſhall have it, as to the inheritance, and therefore, ſo ought the dowreſs too; and if ſhe had been a jointreſs, there is no doubt but ſhe ſhould have had it, and the purchaſer had notice of the marriage; and ſeveral caſes were cited, *Rockby* verſus *Burdett*, Attorney General and *Farmer Cloud* and *Drake*, *Fletcher and Robinſon*, &c.

Poſt 241. 250.

My Lord Chancellor ſaid, he could not help the plaintiff; for though a jointreſs ſhall have the aid of a court of equity in the like caſe, that is, becauſe ſhe has a fixed intereſt by the agreement of the party; but a dowreſs has an intereſt by law, under particular circumſtances; and if it went upon the true reaſon of the thing, a woman ſhould be as well endowed of a truſt of an inheritance, as of the inheritance itſelf, which yet all agree ſhe ſhall not be; and where an inheritance, upon which a term is attendant, is recovered, there the term ſhall go along with it, for it muſt either do ſo, or be extinct, for the truſtee cannot have it. This caſe has frequently happened, and yet was never

66 helped, * which is a ſtrong argument, it cannot be. In the caſe

of

of † *Snell verſus Clay* the term did go to the tenant by the courteſy, but this point was not ſtirred there; however, that was againſt an heir at law, and that is another caſe; but here is a purchaſer, if there had been any agreement to have had the benefit of it, as there was in the caſe of *Barker* and *Fouke*, it would have done it; but in this caſe I can't aſſiſt the dowreſs againſt a purchaſer, nor perhaps could I againſt the heir.

† 2 Vern. 324. 536. 585. 681.

The Lady *Radnor* brought an appeal, and the 14th of *April* 1697, the decree was affirmed in the Houſe of Peers.

67 *DE

Termino S. Hillarii,

1696.

In Curia Cancellariæ.

Case 62. Fairfax *verſus* Heron.

2 Eq. abr. 306, c. 7. 337. c. 8. S. C. Caſes temp. Talbot, 44. 145. Fearne's Cont. Rem. 316. S. C.

One deviſes all his lands after the death of his executors to *A.* and his heirs for ever; but if he die, leaving no ſon, then to *B.* This is a good executory deviſe to *B.* if *A.* dies without iſſue, becauſe the contingency muſt happen within the compaſs of a life.

THIS caſe was ordered to be ſtated by a maſter, and was thus; *William Barker*, Eſquire, being ſeiſed in fee of divers freehold lands of 400 *l. per ann.* the ninth of *November* 1684, makes his will in writing, duly atteſted by four witneſſes, and made his nephew *Henry Fairfax* (his heir at law) executor and reſiduary legatee, and thereby deviſed in theſe words; *I give all my freehold and copyhold lands which I have in poſſeſſion, remainder and reverſion, (not hereafter diſpoſed of) after the death of my executor, to* William Fairfax *his ſon, and his heirs for ever; but if he die leaving no ſon, then to that ſon or ſons my executor ſhall think fit to give them to by his laſt will; which ſon or ſons ſo nominated (if* William *die as aforeſaid) I declare ſhall have my lands, charged notwithſtanding with ſuch annuities, legacies, and payments, as hereafter ſpecified; and for want of a ſon of my executor, I give the ſaid lands to the eldeſt ſon of my niece* Heron, *my executor's ſiſter, charged notwithſtanding as aforeſaid; and I give*

68 *my leaſes to my kinſmen* Paul Jodrel, *and* Thomas Barker, *in* truſt for the benefit of my executor for life; and after his death in truſt for all my executor's children; and for want of any child or child-*

ren, in truſt for the eldeſt ſon of my niece Heron; *and that the leaſes may be renewed if any or more of the lives die, or my truſtees think fit to change any of them, I do deſire they would do it on reaſonable terms.* And if his executor did not provide money enough for that purpoſe within a month after demand, that the truſtees might mortgage any of the lands of inheritance to renew the leaſes (except thoſe belonging to the *Alms-houſe)* and appointed his executor to pay his wife out of any part of the eſtate (except the *Alms-houſe lands*, and a farm near *Workingham*, in the poſſeſſion of *George Goſwell)* 200 *l. per ann.* for life, half-yearly, without any deduction whatſoever, and ſeveral other legacies, and made his nephew *Henry Fairfax* ſole executor and reſiduary legatee.

William Fairfax the executor's ſon died an infant without iſſue, in the life of *William Barker*, and *William Barker* died without iſſue; and *Henry Fairfax* proved his will, and poſſeſſed perſonal eſtate ſufficient to pay all the debts and legacies, and paid them accordingly, and died, leaving plaintiffs his daughters, and coheirs. Mrs. *Heron* the niece had two ſons, *Thomas* the eldeſt (now defendant) and *Horatio*, who were living at Mr. *Barker*'s death; and the queſtion was, Whether *Thomas Heron* took any, and what eſtate by it?

My Lord Keeper was of opinion, that he took an eſtate for life only, and no more; for if lands be given to a man generally, without limiting for what eſtate, this makes but an eſtate for life, unleſs it appears plainly that the teſtator intended a greater eſtate, which it does not here; and the money directed to be paid by him cannot enlarge it, for none of them do affect his perſon, and ſo he cannot take but an eſtate for life.

If lands are deviſed to one generally, he takes but an eſtate for life, unleſs it appear plainly the teſtator intended him a greater, or that he is like to be a loſer, or his perſon chargeable.

Lord Keeper. I think it is as plain he will take that, for all the contingencies upon which he is to take, muſt happen within the compaſs of a life, and ſo no danger * of a perpetuity; and this is the ſame with † *Pele* and *Brown*'s caſe in effect, though not in words, and is like the caſe of ‡ *Brett* and *Rigden*, and the appointee of *Henry Fairfax* would have taken but an eſtate for life.

69

† Eq. abr. 187, pl. 4.

‡ Plow. Com. 345. Eq. abr. 215, pl. 1.

Case 63. Wentworth *verſus* Deverginy.

2 Eq. abr. 51, c. 2. S. C.

A. makes a voluntary ſettlement on *B.* who after agrees to deliver it up without conſideration. This agreement ſhall bind in equity, for a voluntary ſettlement may be ſurrendered voluntarily.

THE late Lord *Strafford* had entertained the defendant firſt as his ſervant; and afterwards having taken a great affection to him as his friend and companion, and had often promiſed to make him a conſiderable fortune, did ſettle an eſtate in *England* on him, of about 150 *l. per ann.* but my Lord afterwards having a mind to have that eſtate back again, the defendant reconveyed it to him, and delivered back the deeds; my Lord ſtill continuing his former kindneſs to him, and his promiſes of making him a fortune.

Accordingly my Lord did ſettle an eſtate he had in *Sligo* in *Ireland* (after his own death) on the defendant and the heirs of his body; and this eſtate was about 800 *l. per ann.*

Afterwards my Lord had a mind to have this eſtate again, which the defendant agreed and complied with, my Lord ſtill continuing his promiſes of making his fortune, and granted him a rent-charge of 600 *l.* out of this *Sligo* eſtate; but by the negligence of my Lord or his agents to demand it, the defendant never delivered up the conveyance of the *Sligo* eſtate, nor made any conveyance of it.

Afterwards my Lord paid the defendant 4000 *l.* to purchaſe off a moiety of this annuity of 600 *l. per ann.* and the defendant thereupon releaſed 300 *l. per ann.* but afterwards my Lord had a mind to have that 300 *l. per ann.* releaſed alſo, and ſpoke to the defendant about it, who often, both by word of mouth, and by letters, promiſed to releaſe it, and a releaſe was brought and tendered to him to be executed; but there having happened ſome
70 difference between my Lord and him, he * refuſed to execute it; whereof my Lord being informed, he came into his chamber (for he lived in my Lord's houſe) and expoſtulated ſharply with him, and thereupon he executed the releaſe, and my Lord and he parted, and never lived together afterwards, nor ſaw one another except once.

My

My Lord died, having made his will, and deviſed all his real and perſonal eſtate (after debts and legacies paid) to the plaintiff, who brought this bill to have a reconveyance of the *Sligo* eſtate, and the ſettlement delivered up.

Defendant inſiſted that he ought not to reconvey, at leaſt not unleſs the 300 *l. per ann.* were made good to him, which he had releaſed by threats and compulſion, as he pretended; or at beſt, that releaſe was voluntary, and without conſideration, and therefore ought not to be aided in a court of equity; beſides, that he was in the nature of a purchaſer, being to part with his intereſt in the land for the rent-charge.

My Lord Keeper ſaid, that a voluntary ſettlement might be ſurrendered without conſideration, and that ſuch ſurrender might be aided by a court of equity, and decreed the conveyance of the *Sligo* eſtate to be delivered up, and the defendant to reconvey it.

* De Termino Paſchæ, 1697.

In Curia Cancellariæ.

Caſe 64.

† Jory *verſus* Cox.

‡ 2 Vern. 401. 549. 2 Wms. 404. 3 Atk. 456.

Decree againſt a mortgagee in poſſeſſion to redeem; but before the account taken, a church becoming void, mortgagee preſents; yet on petition ordered to revoke his preſentation.

THE defendant was a mortgagee, and in poſſeſſion; the plaintiff brought a bill to redeem, and had a decree accordingly; before the account taken, the church became void, and the mortgagee preſented.

Upon the plaintiff's petition, the Chancellor ordered that he ſhould revoke his preſentation, and preſent ſuch a perſon as the mortgagor or his vendee (for he had contracted to ſell) ſhould appoint.

‖ Vide Fitzherbert's Natura Brevium, 79, C. 2 Blackſt. Rep. 1039. and 7 Brown's Parl. Caſes, 450. 1 Burn's Eccleſiaſtical Law, 135, tit. Benefice.

‖ Q. How this revocation is to be; for I think a common perſon can only *variare preſentando*, but not revoke his preſentation, though the king may.

† The above caſe is erroneouſly ſtated. The Editor has ſearched the Regiſter's book, and met with the order, ſtating the proceedings, as follows:

—— Jory, *Quer.* } et è con. 22 *May*, 1697.
—— Cox, *Def.* }

"—— *Cox* preferred his *petition*, ſtating, that being ſeiſed and owner of the manor and eſtate of Normanton, in Nottinghamſhire, and patron of the parſonage and rectory of Normanton, mortgaged the ſame to the plaintiff for 6000 *l.* and the whole mortgage veſted in the plaintiff, and there being conſiderable arrears due, he brought his ejectment and obtained poſſeſſion, and then brought his bill to foreclоſe: and thereupon the defendant *Cox* filed his croſs bill for an account and redemption; ſtating, that upon the 10th of March, articles had been entered into for the purchaſe of the ſaid eſtate, whereby the purchaſers had agreed to pay 10500 *l.* for the ſame. *Before the cauſes were heard*, the incumbent of Normanton died; after which, on the 16th of February 1696, the cauſes were heard and account decreed, and the plaintiff, on payment of intereſt, &c. to reconvey to the defendant; that *the defendant to the firſt bill, Cox*, on the death of the incumbent (as patron of the advowſon) preſented, but the plaintiff, *Jory*, oppoſed the ſame, under pretence, he had a right to preſent, *as being mortgagee in poſſeſſion*, whereas, being a mortgagee, he ought to preſent ſuch perſon as the defendant nominated, but refuſed, by means whereof the right was like to lapſe, and it was prayed, that the plaintiff might preſent ſuch perſon as the defendant ſhould nominate; whereupon his Lordſhip did order, *that the plaintiff do forthwith, at the defendant's charge, revoke and countermand the preſentation by him made to the ſaid living, and that the ſaid plaintiff do, at the like charge, preſent ſuch perſon as the defendant ſhall nominate and appoint to be parſon of the ſaid pariſh of Normanton.*" Reg. 1697. lib. A. 901.

‡ In Vernon it is inaccurately ſtated, that the defendant had an injunction againſt the plaintiff to ſtay his preſentation.

In Curia Cancellariæ.

Cooper *verſus* Williams. Caſe 65.

2 Eq. abr. 290, c. 4. 552, c. 2. S. C. Poſt 200, and references.

A Man deviſes all his perſonal eſtate to his wife for life, *and what ſhe has left at the time of her death, it is my will, and I do deſire her that it may be equally diſtributed betwixt my own kindred and hers.* Teſtator died, and the widow married the defendant.

† Deviſe of chattels for life, with remainder over, good; but if of ſmall value, and the caſe require it, it may be otherwiſe.

* This bill was brought by the relations to have an inventory taken of the teſtator's perſonal eſtate, and that ſecurity might be given that it ſhould not be embezzled, for that by his will the wife had only the uſe of the perſonal eſtate during life; and the words, *What ſhe has left* ſhall be conſtrued to be by reaſon of goods that are *bona peritura*, or may be quite worn out with uſing. 72

On the defendant's part it was ſaid, that the eſtate left was ſo ſmall, that ſhe could not live upon it without ſpending the ſtock.

Maſter of the Rolls. If that be ſo, it may alter the caſe; therefore let the Maſter ſtate the value of the perſonal eſtate, and then I will give further directions.

Sir Evan Loyd and Dame Mary his wife & al' *verſus* Carew & al'. Caſe 66.

Shower's Parl. Caſes, 137. S. C. Eq. abr. 260, pl. 2. S. C. but not S. P. Cro. El. 688. Fearne's Cont. Rem. 200. 317. 321.

A. and *B.* two ſiſters, ſeiſed of lands in fee, for 4000 *l.* paid *A.* by *C.* and in conſideration of a marriage intended and afterwards had between *B.* and *C.* by leaſe and releaſe, convey all their lands to the uſe of *B.* and *C.* for their lives, remainder to their firſt and other ſons in tail-male ſucceſſively; remainder to the daughters of *B.* and *C.* in tail; remainder to the right heirs of *C.* provided that if there be no iſſue between *B.* and *C.* living at the death of the ſurvivor of them; and that the heirs of *B.* ſhould within twelve months after the death of *B.* and *C.* dying

Limitation of a fee upon a fee, on a contingency to happen within a reaſonable compaſs of time, no perpetuity.

† The marginal abſtract of the above caſe appears to be *erroneous*, as moſt probably it turned upon another point; but as it is printed in the former edition, it was thought proper to inſert it. With reſpect to a deviſe of chattels, with remainder over, vide Coke's Inſtit. Harg. ed. 18, b. and Fearne's Cont. Rem. 347.

without iſſue as aforeſaid, pay to the heirs or aſſigns of *C.* 4000 *l.* then the remainder in fee ſo limited to *C.* and his heirs ſhould ceaſe, and that then the premiſſes ſhould remain to the right heirs of *B.* for ever.

Afterwards *B.* and *C.* for extinguiſhing the right title, &c. which *B.* or his heirs then had, or after might have, by any ſettlement, proviſo, &c. on payment of 4000 *l.* or otherwiſe to the
73 heirs of *C.* levy a fine of * the ſaid lands to the uſe of *C.* and his heirs, and directs the truſtees of the firſt ſettlement to convey accordingly; then *C.* deviſes the ſaid lands to *D.* his brother, ſubject to his debts, which were near 5000 *l.* and after *B.* and *C.* die without iſſue.

A. the ſiſter and heir of *B.* brings a bill in Chancery againſt *D.* the brother and heir of *C.* and againſt the truſtees, to have a conveyance of theſe lands, on payment of 4000 *l.* purſuant to the proviſo, but was diſmiſſed.

An appeal was brought in parliament, and for the defendants or reſpondents it was inſiſted, that the proviſo was void, the fee *being before* limited to *C.* and his heirs, and ſo not capable of a further limitation, unleſs to happen in the life of one or more perſons, in being, at the time of the ſettlement, which is the furtheſt the judges have ever gone in allowing contingent limitations upon a fee; and if they ſhould be extended to contingencies to happen within twelve months after the death of one or more perſon or perſons in being, they may as well be extended to contingencies to happen within 1000 years; and ſo all the inconveniencies of a perpetuity will be let in; and the owner of a fee-ſimple thus clogged, will be no more capable of providing for the neceſſities and accidents of his family, than a bare tenant for life.

2*dly*. If this limitation were good, then the eſtate limited to the heirs of *B.* was virtually in her, and her heirs muſt claim by deſcent from her, and not as purchaſers; and then that eſtate is barred by the fine, the deſign of giving ſuch power to the heirs not being to exclude the anceſtor, but becauſe the power in its nature could not be executed till after the death of the anceſtor,

being

being to take effect upon a contingency that was not to happen till after that time, and that by this means *C.* would not only have no portion with *B.* but *D.* his brother would loſe all the money he paid for the debts of *C.* and which were charged on the ſaid lands.

* For the appellants it was urged, that the proviſo was not void; that it was within the reaſon of the contingent limitations allowed in the † Duke of *Norfolk*'s caſe, where it is ſaid, that future intereſts, ſpringing truſts, or truſts executory, and remainders, that are to ariſe upon contingencies, are quite out of the rule and reaſon of perpetuities, if they are not of remote conſideration, but ſuch as will ſpeedily wear out; that though there can be no remainder limited after a fee-ſimple, yet there may be a contingent fee-ſimple ariſe out of the firſt fee; that the *ultimum quod ſit* of a fee upon a fee, is not yet plainly determined; that there could not in reaſon be any difference between a contingency to happen during life or lives in being, and within one year after; and the reaſon of allowing them to be good, if confined to lives in being, or upon their deceaſe, was, becauſe no inconvenience could follow, and the ſame rule will hold to a year after; and that the true rule to ſet bounds to them is, when they prove inconvenient, and not otherwiſe; that this ſettlement was made with good advice. 74

† 3 Ch. Caſes, 30.

2dly. That the fine could not bar this proviſo, becauſe the ſame never was nor could be in *B.* who levied it.

Mr. *Vernon* added alſo this reaſon, That if the proviſo had been, that if *B.* die without iſſue living at the death of the ſurvivor of them, then if the heirs of *B.* do, upon the death of ſuch ſurvivor without iſſue, pay 4000 *l.* to the heirs of *C.* then, *&c.* this you agree had been good, but being extended to a year after, it is otherwiſe, and may as well be 4000 *l.* years after. To this he ſaid, if the proviſo had been ſo worded, it would have been impoſſible to be performed; for then the heirs of *B.* who could not be known till her death, would have been obliged to carry always 4000 *l.* about them, ready to pay; and to have the heirs of *C.* who likewiſe could not be known till after his death, al-

75 ways ready to receive it upon the inſtant of the death of * the ſurvivor; and it might happen that neither the one who was ready to pay it, nor the other who was ready to receive it, might be heirs of *B.* and *C.* and ſurely when the heirs of neither could be known till their deaths, twelve months was but a reaſonable time to procure and pay ſo great a ſum as 4000 *l.* which ſhews that a limitation of a fee after a fee, upon a contingency to happen within one or more life or lives in being, or upon their deaths, being allowed to be good, may be extended further, when, as the limitation may happen to be, it would be inconvenient or impoſſible to be performed within ſuch a time; and that inconvenience is only to be the bound to theſe limitations, which here is ſo far from being inconvenient, that it would be inconvenient and impoſſible to be performed otherwiſe.

For theſe reaſons the decree of diſmiſſion was reverſed,

*DE 76

Term. S. Trinitatis,

1697.

In Curia Cancellariæ.

Preſton & Ux' *verſus* Waſey & Ux'. Caſe 67.

2 Eq. abr. 55, c. 1. S. C. Gilb. Ch. 242. Poſt 538.

Feme covert heir at law, and her huſband being drawn in to enter into articles for ſupplying the defect of a ſurrender of copyhold lands to the uſe of a will, whereby they were deviſed to the plaintiff; the plaintiff not allowed to carry theſe articles into execution, *in reſpect of the fraud*, and againſt a feme covert heir at law.

ONE *Worts* had by will deviſed *inter al'* ſeveral lands to his wife, part of which were copyhold, and were ſurrendered to the uſe of his will, and others were not ſurrendered; the wife was executrix, and intermarried with the plaintiff *Preſton*, and they for a ſmall conſideration got the defendant *Waſey* and his wife (who was heir at law to *Worts* the teſtator) to enter into articles for the conveying of theſe lands, and making good the will of *Worts*; and afterwards, on pretence of ſome miſtake in the firſt articles, they were prevailed on to enter into new articles to the ſame purpoſe: there was ſome conſideration for their entering into the articles, but it appeared they were not well apprized of their intereſt when they did; and there was ſome art uſed to bring them to it. And this bill was brought to have a ſpecific performance.

But the Maſter of the Rolls would not decree the articles of a feme covert for conveying her inheritance to be ſpecifically performed, but diſmiſſed the bill, and left them to their remedy at law, as they ſhould be adviſed; * and on appeal my Lord Keeper 77

affirmed

affirmed the decree, but went upon the fraud, and did not ſeem to take notice of its being the inheritance of a feme covert, &c.

Caſe 68.

Serjeant *verſus* Puntis.

Will of lands made before the Statute of *Frauds* had but two witneſſes, and the teſtator died after the ſtatute, yet the will being made before held good.

A Man made a will of lands ſeveral years before the Statute of *Frauds and Perjuries*, and the will had but two witneſſes to it; the teſtator lived ſome time after the ſtatute, and then died without altering his will.

Maſter of the Rolls. I think it is a good will to paſs the lands, being made before the ſtatute, though the teſtator died after; but the other ſide inſiſting to have it tried at law, he directed it accordingly.

*DE 78

Termino S. Mich,

1697.

In Curia Cancellariæ.

Trotter *verſus* Williams. Caſe 69.

2 Eq. abr. 344, c 2. S. C.

A Man made his will, and after ſeveral legacies deviſes in this manner: *Item*, I give and bequeath to *A.* 500 *l.* to *B.* 500 *l.* and ſo gives 500 *l.* apiece to five others; and my will is, that if any to whom I have given any money legacy, *happen to die*, that then her legacy, and alſo the reſidue of my perſonal eſtate, ſhall go to ſuch of them as ſhall be *then living*, equally to be divided betwixt them all,

One deviſes to *A.* 500 *l.* to *B.* 500 *l.* and ſo to five others the like ſum, and if any to whom I have given any money legacy, happen to die, then his or her legacy, and alſo the reſidue of my perſonal eſtate, to go to ſuch of them as ſhall be then living: Decreed it ſhould be taken to be living at the death of the teſtator, and not at any time after; ſo that the death of any of the legatees after, would not carry it to the ſurvivors.

All the legatees live to be of full age, and then one of them makes her will, and deviſes her 500 *l.* to the plaintiff, and dies, and the queſtion was, Whether this deviſe made by her were good, or whether the legacy of the deceaſed perſon ſhould be divided amongſt the ſurvivors by the will of the firſt teſtator, or ſhall go without reſtraint of time?

The *Attorney General* argued, that there was no ground at all to reſtrain the words, *happen to die*, to a dying, during the life of the teſtator; and there is no need * of making that conſtruc- 79

tion for ſaving it from being a lapſed legacy, for that is as well done by the deviſe of the ſurplus, and there is no time limited; ſo that his intention is plain, and muſt be taken to be a deviſe of the legacy for life only, and as to the ſurplus, that is not given till the laſt clauſe upon the contingency.

Rawlinſon ſaid, that if a time of payment had been limited, that might have made it have another conſtruction than now it will, and cited the caſe of *Clerk* verſus *Bridges*.

Cur. The words *ſhall go to ſuch of them as ſhall be then living*, muſt refer to a certain time, and that is, when the legacies become payable, which is at the death of the teſtator.

Caſe 70.

Joſeph *verſus* Mott.

2 Eq. 459, c. 3. S. C. Salk. 507. Caſes temp. Talb. S. C. cited, 223. Ib. S. P. 217. 1 Wms. 297. 3 Wms. 401, and n. Poſt 179. 188. 4 Brown's Parl. Caſes, 287.

A decree in Chancery againſt an executor *preferred to a judgment at law againſt him, being prior in time.*

A Man made his will, and died indebted to ſeveral perſons by bond more than his perſonal eſtate would pay; a bond creditor of the teſtator's brought a bill againſt the executor to have a diſcovery and account of the perſonal eſtate, and a ſatisfaction of his debt; at the hearing the executor made default, ſo there was a decree againſt him for an account and ſatisfaction out of the aſſets *niſi, &c.*: before the decree was made abſolute, another bond creditor of the teſtator brought an action of debt at law againſt the executor, upon a bond; he appeared, and becauſe he could not plead this decree at law, ſuffered judgment to go againſt him by default; and the account being carried on before the Maſter, the queſtion before him was, Whether he ſhould allow this judgment on the account? And he being in doubt, reported the matter ſpecially to the court for their direction.

The Maſter of the Rells was of opinion, that the decree muſt be preferred, and it coming now to be reheard before my Lord Chancellor, he was of the ſame opinion.

*D E 80

Termino S. Hillarii,

1697.

In Curia Cancellariæ.

Duke of Norfolk *verſus* Browne. Caſe 71.

Eq. abr. 381, pl. 4. S. C.

A grant of the next avoidance to one without his privity held a reſulting truſt for the grantor, no other truſt being declared.

THE late Duke of *Norfolk*, plaintiff's father, had executed a grant of the next avoidance of a church to the defendant's father, who was a clergyman, and a perſon much inſtruſted and employed by him, and the grantee knew nothing of the making of this grant, and being examined in a cauſe, depoſed that he did not purchaſe it of the duke.

Lord Keeper. This is a reſulting truſt for the grantor, there being no other truſt declared.

Smith *verſus* Loader. Caſe 72.

2 Eq. abr. 478, c. 4. S. C. 2 Vern. 346 †. Brown's Rep. 149

A. being to procure 1000 *l.* for *B.* borrows it, and pays *B.* only 300 *l.* and takes other 300 *l.* himſelf, and

PLAINTIFF being a man of eſtate, and wanting 1000 *l.* applied to the defendant, who was a ſcrivener, to procure it for him; but told him, he would not borrow it of any mechanick, but of a gentleman. *Loader* treated with one *Burroughs* a vint-

the remaining 400 *l.* in goods which prove worth little or nothing, and for ſecuring the whole 1000 *l.* both gave a recognizance; yet that being ſued againſt *B.* he brought this bill, and had a perpetual injunction againſt the recognizance on payment of 300 *l.* only, and intereſt, by reaſon of ſome circumſtances of fraud in *A.*

† More accurately ſtated in Vernon, under the name of *Smith* v. *Burroughs*.

ner,

ner, who agreed to lend the money, and the recognizance was
81 * taken, in name of *J. S.* a country gentleman, in truſt for *Burroughs*; and the plaintiff did not know that *Burroughs* was the lender of the money, and ſome care had been uſed by *Burroughs*, that he might not know it.

Three hundred pounds of the money was paid to the plaintiff upon his entering into a recognizance, and a day or two after, 300*l.* more was paid to the defendant *Loader*, and the other 400*l.* *Loader* had taken in wine (being, as he ſwore in his anſwer, ſo to do by *Burroughs*) and the wines were not really worth above 150*l.*

Execution upon this recognizance was ſued out againſt the plaintiff, and he brought this bill to be relieved, upon payment of the 300*l.* only, which he himſelf had received, pretending, that this was only a contrivance betwixt *Loader* and *Burroughs*.

The Maſter of the Rolls took it to be nothing elſe but a contrivance, and therefore decreed a perpetual injunction againſt this recognizance, upon the plaintiff's payment of 300*l.* with intereſt; and upon appeal to my Lord Chancellor, he affirmed the decree, though no other evidence than as before.

Caſe 73.

Bowater *verſus* Ellis.

TENANT for life, and *Ceſtuique Truſt* in remainder in tail, joined with the truſtee in making a feoffment of the land; this a good bar of the eſtate tail.

In Curia Cancellariæ.

Lord Briſtol *verſus* Hungerford.

Caſe 74.

Antè, 12. and references. 2 Vern. 645. S. C †. 3 Wms. 194. S. C. cited.

Lands deviſed to be ſold for payment of his debts, and that the ſurplus ſhould be deemed part of his perſonal eſtate, and go to his executors, and gives his executors 100 *l.* apiece as a legacy; the ſurplus decreed a truſt in the executors, and ſubject to diſtribution, for the direction concerning the ſurplus was only to exclude the heir, not to give it to the executors in their own right.

SIR *William Baſſet* made his will in writing, and thereby deviſed lands to be ſold for the payment of his debts, and wills, that the ſurplus ſhall be deemed * part of his perſonal eſtate, and go to his executors, and gives to his executors 100 *l.* apiece as a legacy.

The queſtion was, Whether, as this caſe is, the executors ſhould have the ſurplus to their own uſe, or ſhould diſtribute it according to the Statute of Diſtributions?

It was urged for the executors, that by the will it is expreſsly ſaid, that the ſurplus ſhould be part of his perſonal eſtate, and go to his executors; and therefore it muſt be underſtood, he meant it them, to their own uſe; and his giving them a legacy of 100 *l.* apiece cannot alter the caſe, for the ſurplus might, perhaps, be nothing, and therefore he gave them the 100 *l.* that they might in all events be ſure of ſomething, and not to exclude them of the benefit of the ſurplus; and this being a deviſe of the ſurplus after debts and legacies paid, cannot be a truſt in them, for then all their truſt is performed, when debts and legacies are paid.

On the other ſide, it was ſaid, that the words in the will, that the ſurplus ſhould be part of his perſonal eſtate, *and go to his executors*, were only intended to exclude the heir, who elſe would have had it, and not to give any greater intereſt to his executors than they would have otherwiſe, *curia adviſare vult*, but afterwards decreed it to be a truſt in the executors.

† In Vernon it is *erroneouſly* ſtated to be *a truſt for the heir at law*. Vide the note, 3 Wms. 194. which confirms the accuracy of the caſe, as here reported.

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MVSEVM
BRITANNICVM

*DE

Termino S. Mich.

1698.

In Curia Cancellariæ.

Caſe 75.

Cowſlad *verſus* Cely.

1 Eq. abr. 73, pl. 18. 2 Eq. abr. 165, c. 3. S. C. 2 Atk. 510. Bunbury, 200.

Two executors, and a bill by a reſiduary legatee againſt one only, to have an account of his own receipts and payments; yet at the hearing the objection for want of the other diſallowed, unleſs in the proceſs of the cauſe it ſhould appear neceſſary: So where two factors are, a bill has been allowed againſt one, the other being beyond ſea.

THE plaintiff being a reſiduary legatee, brought his bill againſt the defendant, who was one of the executors (without his co-executor) to have an account of his own receipts and payments.

Defendant inſiſted at the hearing, that his co-executor ought to be made a party; and that, though a bill might be brought againſt one factor without his companion, if he were beyond ſea; yet that had been allowed only *for neceſſity*, and that it was otherwiſe in caſe of executors.

Lord Chancellor. The cauſe ſhall go on, and if upon the account any thing appear difficult, the court will take care of it: The reaſon is the ſame here, as in caſe of joint factors; and the running out of proceſs in this caſe, is purely matter of form, and I doubt whether a foreigner can be ſerved with a *ſubpœna* in a foreign country.

Hutchins

* *Hutchins* ſaid, he remembered that the Great Duke of *Tuſcany* had laid ſeveral perſons by the heels, for executing a commiſſion to examine witneſſes in his dominions without his leave. 84

Balch *verſus* Wilſon. Caſe 76.

A Feme covert has power given her by her huſband to make a will: probate of ſuch will *per Teſtes*, is ſufficient proof without other proof; becauſe, as to that purpoſe, the huſband has made her a feme ſole, and no prohibition will lie. 2 Eq. abr. 157, c. 2. S. C.

Bold *verſus* Corbett. Caſe 77.

Ante, 22.

THE Lord Chancellor ſaid, in this caſe voluntary conveyances might be aided in a court of equity; but where there is no remedy at law, it is diſcretionary in this court to interpoſe or not.

Diſcretionary in a court of equity, whether it will aid voluntary conveyances, when there is no remedy at law.

Kirk *verſus* Webb. Caſe 78.

S. C. 2. Freem. 229.

Poſt, 163. 168. 171. 2 Vern. 440. 480. 2 Eq. abr. 743, c. 1. 2 Wms. 414. 1 Atk. 59.

THE preſent queſtion in this caſe, was occaſioned by a conſtruction that was made by the Houſe of Peers, upon a ſettlement and will of Sir *Henry Wood*, (which together made but one conveyance) whereby his eſtate was ſettled on his daughter, upon her marriage then intended, and afterwards ſolemnized between her and the then Earl, now Duke of *Southampton*.

A truſtee purchaſes lands out of the profits received out of the truſt eſtate, and takes the conveyance in his own name; though poſſible, if he be unable to make other ſatisfaction for the profits ſo miſapplied, thoſe lands may be ſequeſtered; yet they cannot be decreed to be a truſt for the *Ceſtuique Truſt*, no more than if *A.* borrow money of *B.* and therewith purchaſes lands; theſe purchaſed lands are no truſt for *B.* for it is not a truſt in writing; and reſulting truſt it cannot be, becauſe that would be to contradict the deed by parol proof, directly againſt the Statute of Frauds; but if the purchaſe had been recited to have been made with the profits of the truſt eſtate, this appearing in writing might ground a reſulting truſt.

† The eſtate was conveyed to truſtees (whereof the Biſhop of *Litchfield and Coventry*, Sir *Henry*'s brother, was * one) and the clauſe that bred the firſt diſpute was a limitation, whereby the truſt of the eſtate was limited, after the death of the Duke of 85

† Shower's Parl. Caſes, 83.

Southampton without iſſue, to the *Ducheſs* for life, *&c.* and after to the *Biſhop* for life, *&c.* and after to Sir *Cæſar Cranmer* al' *Wood* for life, *&c.*

The *Ducheſs* died in the life-time of the Duke, without iſſue, and the *Biſhop* conceiving himſelf to be then entitled in his own right, entered and enjoyed the profits for ſeveral years, and till his death, and made his will, and the defendant executor, and deviſed ſeveral legacies to charities, and deviſed all his lands to the defendant.

After the death of the *Biſhop*, Sir *Henry Wood* entered, and the Duke of *Southampton* being then adviſed, that though there were no limitation of the truſt of the eſtate to him, but only that after his death, without iſſue by the *Ducheſs*, it ſhould go to the *Ducheſs* for life, *&c.* yet by the plain intention of Sir *Henry Wood*, it did belong to him, and being in the caſe of a truſt would be ſo expounded.

Upon which the Duke of *Southampton* brought a bill in this court againſt Sir *Cæſar Cranmer*, to have a conveyance of the eſtate for his life, and an account of the profits; and the court were of opinion with the Duke, that by the intention of Sir *Henry Wood*, he was to have the eſtate for his life, and decreed accordingly; but Sir *Cæſar Cranmer* brought an appeal in the Houſe of Peers, and the Lords reverſed the decree, for that there was no eſtate limited to the Duke of *Southampton*; and it not being limited over till after his death, the intereſt during his life belonged to the heirs of Sir *Henry Wood*, as an undiſpoſed intereſt.

The two defendants, who, together with Sir *Cæſar Cranmer*, were coheirs to Sir *Henry Wood*, brought a bill to have two thirds of the eſtate, during the life of the Duke of *Southampton*, and obtained a decree accordingly.

86 * Upon which, the plaintiff *Kirk*, as adminiſtrator to his wife, who was the only child of *John Wood*, who was eldeſt brother of Sir *Henry Wood*, and as ſuch was during her life entitled to the profits that had been received by the *Biſhop* out of Sir *Henry*'s eſtate,

eſtate; inſiſted that the *Biſhop*'s executor ought out of his perſonal eſtate to make them good to him; and that the *Biſhop* had out of the profits of Sir *Henry Wood*'s eſtate, purchaſed ſeveral lands, which being purchaſed with his wife's money were a truſt for her, and now for him, as her adminiſtrator, and ought to be decreed to him, in caſe he had not a full ſatisfaction out of the *Biſhop*'s perſonal eſtate.

Upon hearing of the cauſe, the perſonal eſtate was decreed liable to the plaintiff's ſatisfaction, and an account ordered to be taken of it, and the Maſter to report what charities, or other legacies, the defendant, the executor, had paid; and at what time, and what purchaſes the *Biſhop* had made in his life-time, and the particular times and values of each purchaſe, and what of the ſaid purchaſes had been made with the profits of Sir *Henry Wood*'s eſtate, and then the court would give directions, as to what payments ſhould be allowed to the executor; and how far the eſtates purchaſed by the *Biſhop* ſhould be liable to make the plaintiff ſatisfaction.

The Maſter made his report, certifying the purchaſes made by the *Biſhop*; and that it appeared to him by proof (of a man who received great part of the profits of the truſt, and paid the money for ſeveral of the purchaſes) that ſuch particular parts of the purchaſe-money of the ſeveral purchaſes, were the profits of the truſt, *viz.* Sir *Henry Wood*'s eſtate.

The matter ſtanding this day to be heard upon the Maſter's report, my Lord diſallowed the executor all the charities and other legacies (which were very conſiderable) which he paid, though they were paid before this bill was brought.

* Then the matter as to the land was debated, and my Lord ſeemed to be of opinion for the plaintiff as to that too, and ſaid, that the *Biſhop* was a truſtee, though he did not take himſelf to be one, and that when a truſtee laid out the money of *Ceſtuique Truſt* in lands, he thought the lands might be followed. 87

But it being ſtrongly inſiſted upon by the other ſide, that they could not, and that it was a matter of great conſequence, and

never done before, my Lord appointed to consider of it till a further day, and desired the assistance of the Master of the Rolls and Mr. Justice *Powell*.

On arguing the case before them, it was insisted for the plaintiff, that it is but justice and reason that the lands purchased with the profits should go in the same manner as the profits themselves would have gone; and though it did not appear in the case, that the whole purchases had been made with the trust-money, that was through the trustees own fault, whose part it was to have kept the account, and it did appear in the cause, that he had received enough of the trust estate to make all the purchases, and therefore it shall be intended it was all so employed, unless the contrary be proved by the defendant; and
1 Wms. 83. it was compared to the case where a man mixes his money with another man's heap, he shall lose his own money; it was said, If this fact had appeared in the deed, it would have been a resulting trust, and that this is the same thing, as if a guardian lays out the money of his ward in land, and leaves no personal estate, shall not the land be liable? And if a bill had been brought against the *Bishop*, these lands might certainly have been sequestered in his hands, and shall his devisee be in a better condition? And the case of *Piere and Harwood*, and some other cases, were cited.

On the other side, it was said, that it must be considered how it was before the Statute of *Frauds and Perjuries*, and how it would be since: before the statute it was never held to be a trust, unless there were a declaration in the deed to that pur-
88 pose, and much less can it * be so since the statute; for by the statute there can be no trust, unless it be declared in writing (which is not in this case) and if it be a resulting trust, it is made so by parol proof, contrary to the deed, which is directly contrary to the statute, and would introduce all the mischiefs that it intended to prevent; that it would introduce an utter uncertainty into all men's titles, for the best title may be spoiled by proving the purchase-money to be another person's; and it was said, that this can no more be a trust, than if *A.* had bor-

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rowed money of *B.* and laid it out in land, that land could be a truſt for *B.* and the caſe of *Cox* and *Carr*, and other caſes, were cited.

Juſtice *Powell* ſaid, the precedents that had been cited on the plaintiff's part were nothing to the purpoſe, ſo that it is a caſe without precedent, and of great and dangerous conſequence: he cited the caſe of *Walter de Chirton*, who was the king's receiver; and it was found that he purchaſed land with the king's money, yet this was never held to be a reſulting truſt, not even in the king's caſe; that it was againſt the Statute of *Frauds and Perjuries*, and would let in all the miſchiefs that it intended to prevent; therefore he was of opinion the plaintiff could not be relieved.

The Maſter of the Rolls was of opinion, That as this caſe was, the plaintiff could not be relieved, and cited the caſe of *Farrington* verſus *Forth*, and 4 *Inſt. Tit. Court of Chancery*; and the caſe of *Mears* and *St. John*, 1686; but he ſaid, if it had been expreſsly and plainly proved that theſe purchaſes had been made with the profits of the truſt eſtate, he thought it might have been otherwiſe.

My Lord Chancellor was of the ſame opinion with Mr. Juſtice *Powell*. On appeal to the Houſe of Lords, this decree was affirmed, 7 *March* 1699.

89 *DE

Termino S. Hillarii,

1698.

In Curia Cancellariæ.

Case 79. Bayly *versus* Robſon.

2 Eq. abr. 594, c. 1. 2 Strange, 1107. 1 Wms. 775. 1 Vezey, 86. S. P.

Mortgagor borrows more money on bond, the vendee of the heir of the mortgagor ſhall redeem the land without paying the bond debt.

A Mortgagee in fee lends money to the mortgagor upon bond, and the mortgagor dies, and his heir ſells the equity of redemption.

Lord Chancellor. The vendee of the heir of the mortgagor ſhall redeem the land without paying the money lent on the bond.

Case 80. Earl of Warrington *verſus* Sir James Langham.

Eq. abr. 132, pl. 14. S. C. 1 Wms. 107.

One covenants on marriage articles to pay 10000*l.* within ſix months after his death; and after growing old and infirm, covenantee would have obliged him to have given ſecurity; but the court held, that they could not alter this agreement of the parties, or make it better than they themſelves had; and though executors might be obliged to give better ſecurity for legacies payable *in Futuro*, that is, becauſe they are in nature of truſtees, and there is no agreement one way or another.

PLAINTIFF's father married Sir *James Langham*'s only daughter; and upon the marriage-articles entered into between the defendant and plaintiff's grandfather, by which the defendant covenants, that he would within ſix months after the marriage pay the plaintiff's grandfather 10000*l.* and that his

executors

executors ſhould pay him 10000*l.* within ſix months after his death, and the * earl covenanted to make the wife a jointure of 1500*l.* but no covenant for making any ſettlement upon the children. The marriage took effect, and the defendant paid the 10000*l.* and the jointure was made, and both plaintiff's father and mother were dead. 90

The defendant being grown old, and having married a fourth wife, the plaintiff his grandſon brought this bill, pretending, that the defendant was grown very weak in his underſtanding, and wholly influenced by his wife, and it was greatly to be feared would ſpend or make away his eſtate, and not leave wherewithal to pay the 10000*l.* at his death; and therefore, to have the money paid preſently, the defendant having an allowance of the intereſt, or at leaſt, that he might give better ſecurity to pay it when it became due, was the bill.

The defendant ſwore by his anſwer, that upon the treaty of marriage, no other ſecurity was required for the money but his covenant, and if there had, he would never have conſented to the match.

It was urged for the plaintiff, that it is but juſt that every man ſhould make their creditors ſafe, that their debts ſhall be paid at all events, and this court ought to extend its authority to prevent them from being defeated; that this court does enforce executors to give ſecurity to pay legacies, which are to be paid *in Futuro*; that this is a debt *in Preſenti*, though not yet payable; and that by the cuſtom of the city of *London*, debtors may be arreſted before the day of payment to give better ſecurity; and that this court did grant *ne exeat Regnum*, againſt perſons that were going away to avoid payment of their debts.

On the other ſide, it was ſaid, that this bill is not to execute an agreement between the parties, but to make a new one; that an executor was but a truſtee of the teſtator's money for the legatee, and the court might take ſuch methods as were proper to make him execute the truſt; but in that caſe there is no agreement between the executor and legatee one way or

91 other; and * the queſtion here is, Whether, when there is an agreement between the parties, any court can alter it? And as for the cuſtom of *London*, for arreſting a debtor before the time of payment, to give better ſecurity, it was much doubted whether there was any ſuch cuſtom; but if there be, all their cuſtoms are confirmed by act of parliament, and therefore they may do what no other court can, which have not the ſame warrant for it.

My Lord Chancellor diſmiſſed the bill, and an appeal was brought in the Houſe of Lords and heard; but the Lords put it off from time to time (to the end the parties might agree it) and would do nothing in it, and at laſt there was an agreement, the plaintiff complying with the defendant's terms, and the defendant died ſoon after.

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* DE 92

Termino Paſchæ.

1699.

In Curia Cancellariæ.

Duke Hamilton & Ux' *verſus* Lady Gerrard. Caſe 81.

Pract. Reg. 7. 1 Wms. 146.

A peereſs ordered to produce deed; confeſſed in her anſwer on honour only, not on oath.

THE bill was *(inter al')* to diſcover deeds and writings which belonged to the plaintiff's wife's eſtate; the defendant by anſwer owned ſhe had ſeveral in her power, but did not ſet them forth; and on the plaintiff's motion ſhe was ordered to produce them on oath.

But on application to the court, that order was altered, and ſhe was ordered to produce them on honour only, being in ſupplement of her anſwer, which was only on honour, being a peereſs. And ſo it was ordered in a caſe of *Powell*, late Maſter of the Rolls, againſt the Counteſs of *Dorſet*.

Bayly *verſus* Powell & cont'. Caſe 82.

2 Vern. 361. S. C. †

Elizabeth Burgeſs made her will, and gave legacies to all her relations (which, as appeared, ſhe had no great kindneſs for) but did not truſt ſome of them with their own legacies, but deviſed

† Reference has been had to the Regiſter's book, and it appeared, that in this caſe the legacies had been ſatisfied, and releaſes taken from the plaintiffs: the original bill was filed for the purpoſe of ſetting aſide the releaſes, and prayed a diſtribution.

Powell

deviſed them to truſtees, to be put out for their benefit. She likewiſe gave 50*l.* to one of her executors, and 20*l.* to the other; and the queſtion was, Who ſhould have the ſurplus? which was conſiderable.

My Lord Chancellor decreed it to be diſtributed, and the *executor to pay coſts for inſiſting on it.*

Powell (one of the executors) by his anſwer ſtated declarations of the teſtatrix, that her relations ſhould have no more, and hoped to prove that the teſtatrix intended the ſurplus for the executors: *Mead* (the other executor) by his anſwer ſtated, that the ſurplus amounted to 700*l.* but did not inſiſt on his moiety. A croſs bill was filed, in order to eſtabliſh the releaſes. Upon the hearing of this cauſe, it was decreed, that the executors ſhould account and pay what ſhould be remaining, after payment of debts, &c. to the plaintiffs, in equal thirds (the brother and two ſiſters of the teſtatrix) and *Powell* to pay the plaintiffs their coſts; the croſs bill diſmiſſed with coſts, 6th *December* 1698. Regiſter's book, l. A. 27 b. This caſe is amply commented upon by Lord Loughborough in the deciſion of *Bowker* v. *Hunter*, Brown's Rep. 333. In this modern caſe all the various authorities are thoroughly recognized both in the argument and deciſion, and the principles of the doctrine upon this ſubject fully diſcuſſed: it was held, that the executors taking unequal legacies in their own names ſhould be entitled to the reſidue,

DE

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Termino S. Trinitatis,

1699.

In Curia Cancellariæ.

Crew *verſus* Jolliff.

Caſe 83.

2 Eq. abr. 237, c. 1. S. C.

Plaintiff's daughters by a ſecond *Venter*, brought their bill againſt the defendant's daughters by a firſt *Venter*, to prove their father's will, whereby lands were deviſed to be ſold to raiſe plaintiffs portions; and on a trial at bar, and verdict for the will, defendants ordered to join in a ſale, but were allowed their coſts both at law and in equity.

MY Lord *Crew* made his will, and deviſed lands to be ſold for raiſing portions for the plaintiffs, who were his daughters, by a ſecond *Venter*; and this bill was brought by them and the executrix, to have the will proved, and the truſt performed.

Defendants were his daughters by a firſt *Venter*, and were all married by him in his life-time, but had not near ſo great portions as the plaintiffs, who together with defendants were his coheirs, and by anſwer inſiſted to have the validity of the will tried at bar, which was thereupon ordered accordingly: and at the trial, defendants perceiving the matter againſt them, gave no evidence; ſo there was a verdict for the will. And now the caſe ſtanding on the equity reſerved, the defendants were ordered to join in a ſale, but were to have their coſts †, both here and at law, upon their joining, though it was inſiſted on the other ſide, that they ought not to have coſts, having, as now appeared by verdict, wrongfully occaſioned all the expence.

† 2 Wms. 285. 3 Wms. 373.

Dormer

Caſe 84.

* Dormer *verſus* Bertie.

Antè, 31. 2 Eq. abr. 430, c. 5. 434, c. 15. S. C.

Where lands are deviſed to the executors to be ſold for ſeveral purpoſes, and the ſurplus is expreſsly deviſed to them, there can be no reſulting truſt for the benefit of the heir.

MR. *Robert Dormer* having no children, but ſix brothers of the half blood, and the plaintiff, who was his couſin and heir of the whole blood, by will gives the plaintiff 50 *l.* to buy him mourning, gives ſeveral eſtates to the ſix brothers and their heirs ſeverally, and ſeveral other legacies; and alſo legacies of 5 *l.* apiece to the defendants to buy them mourning, and then ſays, *All the reſt*, &c. *of my manors*, &c. *goods, chattels*, &c. *and all other my real and perſonal eſtate whatſoever, I give to* Charles Bertie, Peregrine Bertie, *and* John Bertie, (who were defendants) *whom I nominate and appoint executors of this my will, equally to be divided between them, ſhare and ſhare alike, to hold to them, their heirs and aſſigns for ever.*

This bill was brought to have the ſurplus a reſulting truſt for the plaintiff the heir, becauſe the defendants had legacies given them by the will.

But the court held, that if one can give away the ſurplus of his eſtate, it is done here, and no truſt for the heir; and cited the caſe of † *Crompton verſus North, as a much ſtronger caſe, and yet held no truſt*; and though a legacy given an executor, may be an argument againſt him *quoad* the ſurplus, when not expreſsly given him; yet it can be no argument at all, when it is expreſsly given him. Alſo the plaintiff the heir has a legacy given him, and not the ſurplus, which turns the argument as ſtrong againſt him; and an appeal being afterwards brought in the Houſe of Lords, this decree was affirmed that it was no truſt for the heir.

† 2 Vern. 645. S. C. cited.

Cary

* Cary *verſus* Pulford.

Caſe 85.

3 Atk. 278.

One ſells his eſtate of 14*l.* *per ann.* for an annuity of 26*l.* *per ann.* during his life, with clauſe of re-entry for non-payment; and the annuity being in arrear, and the purchaſer being unable to pay it any longer, the grantee re-enters, and deviſes theſe lands to defendant,

J. S. had an eſtate, part freehold and part copyhold, of about 14*l.* *per ann.* which he uſed to ſpend uſually in the houſe of one *Brick* a poor alehouſe-keeper, and he at laſt perſuaded *J. S.* to ſell him his eſtate for an annuity of 26*l.* *per ann.* and the plaintiff *Cary* (who was an attorney at law) was employed by *Brick* in this matter, and drew the deeds, whereby *J. S.* conveyed his freehold and copyhold lands to *Brick*, in fee for an annuity of 26*l.* *per ann.* for his life, payable half yearly; and there was a condition of re-entry, in caſe it were not paid, and *Brick* covenanted to pay it; and the ſurrender of the copyhold was upon the ſame condition.

and dies about a year after; and the plaintiff having an aſſignment from the purchaſer of all his intereſt, brought this bill to redeem, on pretence of its being in nature of a mortgage, but was diſmiſſed, no redemption being ſought during the life of the grantee, whilſt it was uncertain whether the bargain would be a good or a bad one; and it was only a conditional purchaſe, and not a mortgage.

Brick entered and paid one half year of the annuity, and then was thrown in gaol by his creditors, and his wife declared he could pay the annuity no longer, but that *J. S.* muſt take his land again; and *Brick* had indeed received more out of the lands, by ſale of timber and rents, than he had paid for the annuity; and not continuing to pay it, *J. S.* made a demand, and re-entered into the freehold, and was admitted into the copyhold eſtate, and lived about a year in poſſeſſion, and then died, having firſt made his will, and deviſed the land to the defendant in fee, and made him executor; and he was admitted to the copyhold.

The plaintiff prevails with *Brick* to convey all his intereſt to him, and brought this bill to redeem.

It was inſiſted upon, that this was but the common caſe, where a man takes advantage of a condition for non-payment of money at the preciſe day; and this * court always relieves upon payment of the money with intereſt, from the time it ought to have been paid.

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On the other ſide it was ſaid, that this caſe is not at all like that caſe, and that here there can be no redemption; for that

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the only conſideration of *Brick*'s purchaſe was, that *J. S.* might enjoy a more plentiful ſubſiſtence during his life, and that he was deprived of it by *Brick*'s non-payment; that during the life of *J. S.* whilſt it was doubtful whether the bargain would be a good or a bad one (as it might if *J. S.* had lived long) no redemption was ſought; and now they cannot have it.

My Lord Chancellor ſaid, This is not like the common caſe; here is no conſideration paid by *Brick*, but the annuity only; and therefore I cannot admit of a redemption, or give any relief, and diſmiſſed the bill.

Caſe 86. Daffern *verſus* Bolt.

12 *July*.

2 Vern. 362, S. C. 2 Freeman, 231. S. C. 2 Vern. 43. 195. S. C. cited. Fearne's Cont. Rem. 380, to 382.—*e contrà*, 1 Wms. 132. 2 Vern. 662. 2 Vezey, 646. 1 Wms. 360. Brown's Rep. 206.

Truſt of a term for years limited to *A.* for life, and after his death to the heirs of his body, veſts in them by purchaſe, and not by way of limitation, ſo that *A.* has no power to diſpoſe of it beyond his own life.

A Term for years was aſſigned to *J. S.* in truſt, to permit *J. Bolt* to enjoy the profits ſo many years of the term as he ſhould live; and after his death, in truſt, to permit *Jane* his wife to enjoy the profits for ſo many years of the term as ſhe ſhould live; and after their deaths in truſt to permit the heirs of the body of *Jane*, to be begotten, to enjoy the premiſſes during the reſidue of the term.

The only queſtion in this caſe was the ſame that was made in the caſe of *Peacock* verſus *Spooner*, *viz.* Whether the words *heirs of the body* were words of limitation, and ſo the term diſpoſable by *Jane*, or whether they were words of purchaſe?

This caſe was debated before my Lord Chancellor the 14th of *March* laſt, and he then ſaid he would not be bound by the precedent of † *Peacock* verſus *Spooner*, if he could find any difference in the caſes; but if they were preciſely the ſame, he could not depart from it, and took till this day to conſider of it. He mentioned * *Cranmer*'s caſe in *Dier*, and ſaid, that the words heirs of the body, are words of purchaſe, not of limitation, and that he had conſidered of *Peacock* and *Spooner*'s caſe, and that was a ſtronger caſe than this, and a plainer affectation of a perpetuity.

† 2 Vern. 43. 195. S. C. 1 Eq. abr. 362, pl. 14. S. C.

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DE
Termino S. Mich.
1699.

In Curia Cancellariæ.

Brown *verſus* Gibbs. Caſe 87.

Antè, 65. and the authorities there referred to.

A court of equity will not aſſiſt a dowreſs who has had judgment at law with a *Ceſſat Executio* in removing a truſt term.

J. Harris ſeiſed in fee of certain lands, made a ſettlement of them to the uſe of himſelf for life, then to truſtees for a term for years; then as to one moiety to his ſon *M.* and the heirs of his body, with other remainders over; and the truſt of the term is declared to be for raiſing 200 *l.* apiece for the two daughters of *M.* and a *proviſo*, that if *M.* or the heirs of his body, ſhall pay, *&c.* to the daughters at 21, or marriage, the term to ceaſe.

M. dies without iſſue male, leaving only his ſaid two daughters: plaintiff (who was his widow) recovered dower at law with a *Ceſſat Executio* during the term, and now brought this bill againſt the defendants (who were * the daughters) to ſet aſide the term, that ſhe might have the benefit of her recovery at law. 98

It was inſiſted upon for the plaintiff, that this term ought to be abſolutely ſet aſide, for that the intention of the ſettlement could only be to raiſe portions for daughters, in caſe *M.* had iſſue male; for if he ſhould leave none, as he did not, the daughters were to have the land itſelf, by virtue of the limitations of the ſettlement, and

and they cannot raiſe themſelves a portion out of their own eſtate; and therefore the purpoſe for which the term was intended, failing, the term in equity had no ſubſiſtence; and though where there is a term generally to attend the inheritance, that may perhaps prevent a dowreſs, becauſe it can be intended to be kept on foot for no other purpoſe but to prevent incumbrances; yet it will be otherwiſe in this caſe, where the term is declared to be for a particular purpoſe, which is otherwiſe provided for; and though in the caſe of Lady *Radnor* verſus *Rotheram*, this court would not ſet aſide the term, yet that was, becauſe it was againſt a purchaſer, but there is no purchaſer in this caſe, but we come againſt the heir, and therefore the term in this caſe ought to be wholly ſet aſide; and in the caſe of *Clay* verſus *Snell*, tenant by the courteſy was let in againſt ſuch a term.

Antè, 65.

2*dly*. Admit that the term ſhall not be wholly ſet aſide; yet the plaintiff is intitled to have an account of the profits, and to be let into the benefit of her dower, paying what is unraiſed of the portions; if it were a common mortgage, it cannot be denied but ſhe ſhould redem; and in this caſe the term is only a ſecurity for raiſing theſe portions, which is the ſame thing.

Lord Chancellor. In the caſe of *Clay* verſus *Snell*, there was ſuch an order, but the point was not debated; but the queſtion here is, Whether a court of equity ſhall make a new rule? The judgment that the plaintiff has recovered at law, is with a *Ceſſat Executio*, and therefore to ſet aſide the term would be to relieve her againſt * the very judgment upon which ſhe founds her right of relief. In the caſe of Lady *Radnor* verſus *Rotheram* there was a purchaſer, it is true, yet the court did not go upon that reaſon; and here the plaintiff being a dowreſs muſt be contented with the eſtate as the law gives it; † theredemption of a mortgage is another caſe, for the mortgage is looked upon as a perſonal contract, and mortgagee has no intereſt beyond his money, and therefore diſmiſſed the bill.

99

Antè, 65.

† Poſt, 137, and the note *thereto ſubjoined*.

Parker

In Curia Cancellariæ.

† Parker *verſus* Blackbourne. Caſe 88.

2 Vern. 369. S. C. Gilb. Ch. 41.

If a neceſſary defendant be proſecuted regularly to a ſequeſtration, the plaintiff may go on without him againſt the other defendants; but ſerving a ſubpœna at a place where he lodged but once, and that two years before ſuch ſervice, is not good.

AT the hearing of this cauſe it was objected by the defendant *Blackbourne*, that *J. S.* who was a neceſſary defendant, was not brought to hearing. Plaintiff ſhewed they had proſecuted him to a ſequeſtration, and therefore might go on. Defendant anſwered, that the affidavit on which the proceſs of ſequeſtration was founded, was inſufficient; and upon reading of it, it appeared that the ſubpœna was left at a place where *J. S.* had only lodged once, and that above two years before the ſervice.

The court held it not ſufficient ſervice to go on againſt the other defendant alone, unleſs the plaintiff would conſent to ſtand in the place of *J. S.* to all purpoſes; which he not doing, the cauſe went off for want of parties.

Lord Caſtleton *verſus* Lord Fanſhaw. Caſe 89.

1 Eq. abr. 298, pl. 2. S. C. but not S. P. 2 Eq. abr. 254, c. 1. 259, c. 1. S. C.

One by will deviſes the ſurplus, after debts and legacies paid, to his wife, and makes *A.* and *B.* his executors; the creditors compound for leſs than their full debts, from an apprehenſion there was not aſſets; but aſſets afterwards came in. On a bill by the wife for an account of the ſurplus, the executors would have let in the creditors to their full debts, which would have reduced the ſurplus to little; but the court would not ſet aſide this compoſition, the creditors having no bill for that purpoſe.

THE late Lord *Fanſhaw*, brother to the defendant, had by his will made the defendant the Lord *Fanſhaw* and others his executors; and after his debts and legacies paid, deviſed all the reſidue of his perſonal * eſtate to his wife, now married to the plaintiff the Lord *Caſtleton*.

This bill was brought to have an account of the eſtate, and the benefit of the ſurplus: the executors apprehended there would not be aſſets to pay the debts; and there was a diſpute about a ſum of 4000 *l.* whether it ſhould be accounted aſſets or not, in equity; and whilſt that matter was under debate (it appearing that without that money there were not aſſets, and

† With reſpect to further proceſs after a ſequeſtration for non-appearance, and as to taking the ſuggeſtion of a bill *pro confeſſo* in that caſe, or where the anſwer is inſufficient, ſee 5 G. II. c. 25. 2 Wms. 556, and 2 Atk. 21.

being doubtful whether that money would be adjudged aſſets or not) ſeveral of the creditors compounded with the executors to take leſs than their full debts; but in the year 1684, that 4000*l.* was adjudged to be aſſets, and the executors were deſirous that the creditors might have their full debts; but that was oppoſed by the plaintiff (for that would have reduced the ſurplus to little) and then inſiſted that moſt of the creditors debts were barred by the Statute of Limitations, and that they ought not to be paid at all; but the defendants the executors would not plead the ſtatute; and the two points to be determined were,

1*ſt.* Whether the creditors who had made compoſitions for leſs than their full debts, upon a ſuppoſition of a defect of aſſets, ſhould now be held to that compoſition, when the executors did not deſire it?

2*dly.* Whether the creditors ſhould be ſent to law to recover their debts, and the plaintiff be ordered to make defence in the executors place, and ſo be enabled to bar them, by pleading the Statute of Limitations, which the executors would not do?

Lord Chancellor. I cannot ſet aſide the compoſition the creditors have made, they have no bill for that purpoſe, and only come in before the Maſter, therefore they muſt abide by the compoſition, but I cannot conſent that the Statute of Limitations ſhould be pleaded, therefore their debts muſt be paid.

101
Caſe 90.

* Bamfield *verſus* Wyndham.

Antè, 2. and references. Poſt, 451. 456. 2 Eq. abr. 370, c. 10. Brown's Rep. 145.

One deviſes his real eſtate for the payment of his debts, and the overplus he gives to his ſiſters, and deviſes his perſonal eſtate to his wife, whom he makes executrix. The wife ſhall have the perſonal eſtate exempt from debts.

J. S. deviſed all his manors, *&c.* to truſtees, and their heirs in truſt, immediately out of the rents and profits, or by ſale or mortgage of the premiſſes, or any part thereof, to raiſe and levy money for payment and ſatisfaction of all his juſt debts, with intereſt and charges of the truſtees; and if there ſhould be a ſurplus of lands or money, that to be to his ſiſters jointly, and their heirs, and all my perſonal eſtate to my dear wife, whom I make ſole executrix.

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The queſtion was, Whether the wife ſhould have the perſonal eſtate exempt from debts, or whether that ſhould be applied in the firſt place towards payment of them? For it was urged, that the deviſe being to her, who was made executrix, ſhe ſhall take it only as executrix.

My Lord Chancellor took notice, that the debts were more than the perſonal eſtate amounted to, and therefore he muſt mean, that ſhe ſhould have it exempt from debts, or he muſt mean nothing; and there is in this caſe no room to make a different conſtruction.

Anonymous.

Caſe 91.

2 Atk. 479. 2 Vezey, 308.

A Second marriage ſettlement is recited to be made in conſideration, that the wife had parted with the former ſettlement, which appeared to be made after the marriage; but was recited to be made in conſideration of a marriage portion ſecured, but no proof of any previous agreement for ſuch ſettlement; yet the court preſumed it, and ſo the ſecond not voluntary againſt bond creditors.

A ſettlement after marriage recited to be in conſideration of a portion ſecured, ſhall be preſumed to be in purſuance of an agreement previous to the marriage, tho' no proof of it, and ſo good againſt bond creditors.

* Small *verſus* Lord Fitzwilliams.

102

Caſe 92.

2 Eq. abr. 56, c. 2. 242, c. 2. S. C.

A. Sells an eſtate to *B.* with general covenants againſt incumbrances, and a particular one againſt his wife's dower; then during the life of *A.* and his wife, *B.* articles to ſell to the defendant, and by articles it was agreed, that the defendant ſhould retain 400 *l.* of the purchaſe money in his hands for two years, without intereſt; and if in that time the wife of *A.* releaſed her dower, the defendant to pay 400 *l.* elſe to retain it abſolutely. *A.* dies; his widow did not releaſe her dower within two years, but brought her writ of dower, but died before a recovery of it.

Equity will not relieve againſt the terms of an agreement, though it may ſeem in nature of a penalty.

This bill was to have the 400 *l.* paid, becauſe, but in nature of a penalty to ſecure againſt the dower, which is now at an end,

and the purchaſer now ſecured, as well as if ſhe had releaſed within the two years, or as if after the two years expired, in which caſe, as it was ſaid, this court would certainly have relieved.

On the other ſide it was ſaid, that this was not in nature of a penalty, but the terms of the agreement, and the meaſure of the ſatisfaction for the contingent incumbrance of dower; and that the court would not have relieved on her releaſe, if after two years, much leſs here, where ſhe was ſo far from releaſing, that ſhe brought her writ of dower; and if ſhe had recovered it and lived ſeveral years, the defendant could have had only the 400 *l.* and could not have been permitted, at leaſt, in equity, as aſſignee of *B.* to ſue the covenant of *A.* againſt his own agreement in writing, which took notice of the dower, and this covenant and agreement to retain the 400 *l.* as a recompence for it; and as he run the hazard of her living, he ought now to have the advantage of her dying.

The Chancellor was of the ſame opinion, that he could not be relieved, and decreed accordingly.

103

Caſe 93. * Newton *verſus* Sir Iſaac Preſton, executor of Worts and Briggs, & al'.

2 Atk. 71. 6 Brown's Parl. Caſes, 12.

Mortgage in fee for 700 *l.* paid by *A.* but half of the money was *B.*'s, yet for want of a declaration in writing, *B.* was not admitted to read to the proof of it, ſo as to create a truſt for him, being againſt the Statute of *Frauds*.

THE plaintiff had made a mortgage in fee to *Briggs*, and it was expreſſed to be in conſideration of 700 *l.* paid by *Briggs*. Sir *Iſaac Preſton*, who married the widow and executrix of *Worts*, pretended the money was *Worts*'s, and conſequently, that he was entitled to it.

So this bill was brought againſt the mortgagor to redeem, and was a bill of interpleader againſt the defendants, that they might diſpute the right of the money amongſt themſelves, and that the plaintiff might have his eſtate again, paying what was due to the right hand.

Sir *Iſaac Preſton* inſiſted by his anſwer, that the money was *Worts*'s money, and that he was entitled to it.

Briggs, by his anſwer, ſwore, that the money was his, and inſiſted upon the Statute of *Frauds and Perjuries*, againſt the pretence of Sir *Iſaac Preſton*; but confeſſed there was only 350 *l.* lent; though it was intended at firſt that 700 *l.* ſhould be taken up, and the other 350 *l.* ſhould be employed to pay off a mortgage on the premiſſes made to *Worts*, which was excepted in the covenant againſt incumbrances in this mortgage.

Replications were filed, and witneſſes examined, and all parties joined in the examination, and the queſtion now was, Whether *Preſton* ſhould be admitted to read his witneſſes?

It was inſiſted upon for *Preſton*, that they ought to be read, for that the Statute of *Frauds and Perjuries* was not pleaded, and that this did not ſeem to be within the letter of the ſtatute; that ſo were many other caſes, in which, notwithſtanding, this court had given relief; as where a mortgage was made by way of abſolute conveyance, and a defeazance prepared to be executed at the * ſame time, and as ſoon as the mortgage was ſealed, 104
the mortgagee ſnatched it up, and refuſed to execute the defeazance; ſo if a man employs his ſteward to make a purchaſe with his money, and he take the conveyance in his own name, it was ſaid, the court had relieved in theſe caſes; ſo if a man makes an abſolute conveyance, but continues in poſſeſſion, and pays intereſt, and takes acquittances, and a truſt, that ariſes by implication of law, is excepted out of the ſtatute.

It was ſaid for *Briggs*, that this imports to be a mortgage for money paid by *Briggs*, and they would prove the money to be *Worts*'s, upon which a truſt ſhould follow for them; and though a truſt, which reſults by implication of law be excepted out of the ſtatute, yet that truſt muſt ariſe upon the face of the deed itſelf; and this ſtatute muſt take place, as well in equity as at law, though a particular perſon ſhould ſuffer by it. In this caſe, the ſtatute is inſiſted on only by way of anſwer, and not by plea, for it could not be pleaded here, this being an interpleading bill, and only to redeem; but to another bill brought by Sir *Iſaac Preſton* for the money, the ſtatute is pleaded; if you enquire upon a parol proof, whoſe money it is, you go directly againſt the ſta-

† Antè, 84. tute, and againſt the caſe of † *Kirk* verſus *Webb*, where it was decreed you cannot make an eſtate a truſt, by proving the money to be ſuch or ſuch a one's; and the caſes put on the other ſide, are not like this, but depend upon facts, as acquittances, poſſeſſion, *&c.*

Juſtice Powell. I will not hinder you from reading, for though at law it is not to be allowed, where a jury may be inveigled by that, which is not proper evidence; yet here is no ſuch danger. So the proofs were read, but he would not decree the truſt.

105
Caſe 94.

* Lewkner *verſus* Freeman.

1 Eq. abr. 149, pl. 5. S. C. 2 Freeman, 236. S. C.

A. brings an action againſt *B.* for lying with his wife, after which *B.* aſſigns his eſtate to truſtees in truſt to pay the ſeveral debts mentioned in a ſchedule, and ſuch other debts as he ſhould name within ten days, then *A.* recovers 5000 *l.* damage, and brings his bill to ſet aſide this deed as fraudulent, and made to defeat him of his recovery, but held not to be fraudulent; the plaintiff being no creditor at making the deed, and his debt recovered, after founded in *Maleficio*; but the others were real creditors, which it was conſcientious to prefer, but for the ſurplus the plaintiff may come in. *ſee 3. Atk. 192.*

THE plaintiff had brought his action againſt Mr. *Mountague* for lying with his wife, and 13 *Jan.* 1689, Mr. *Mountague* made a conveyance of his land to truſtees in truſt to pay his debts mentioned in a ſchedule annexed to the deed, and ſuch other debts as he ſhould appoint, within ten days in *Hillary* term following. The plaintiff recovered 5000 *l.* damages againſt Mr. *Mountague*, and brought this bill to be relieved againſt this deed, as fraudulent againſt him, and made to defeat him of his debt.

It was inſiſted upon for the defendant, that this deed is either void at law againſt the plaintiff, or it is not; if it be, the bill ought to be diſmiſſed, becauſe the plaintiff has remedy at law; if it be not void at law, there is no reaſon to relieve the plaintiff here againſt the defendants; the creditors, who are creditors, as well as the plaintiff, and before him, for he was no creditor at the making the deed; and they are creditors more to be favoured in a court of equity, than the plaintiff; for they are creditors for money lent and paid, or wares ſold and delivered; and the plaintiff has only a demand, founded in damages for a tort.

It

It was ſaid for the plaintiff, that if there had been but one creditor, it might have been more proper to have gone to law; but even then we might have come here, for this court has a concurrent juriſdiction with the common law; but as this caſe is, and as there are many creditors, where ſome debts may be good, and ſome bad, we muſt go on here, for where there are ſeveral conſiderations of a deed, and one be good, that * will ſupport the whole deed at law, but not ſo here, and there is no difference between a debt by contract, and a debt founded upon a tort. 106

Cur. This deed is not fraudulent, either in law or equity; for ſuch debts as are named in the deed, the plaintiff was no creditor at the making of the deed; and though it were made with an intent to prefer his real creditors before this debt, when it came afterwards to be a debt, yet it was a debt founded only in *Maleficio*, and therefore it was conſcientious in him to prefer the other debts before it; but the plaintiff may have an intereſt in the ſurplus, after payment of debts, provided for by the deed: let him declare, if he will controvert the debts, and come in upon the ſurplus after the debts mentioned in the ſchedule, or appointed within ten days purſuant to it, are ſatisfied.

Lloyd *verſus* Carew. Caſe 95.

THE decree made in the Court of Chancery in this caſe, having been reverſed by the Houſe of Peers, 27 *Jan.* 1697, without any further direction; and upon the appellant's petition, 24th *March* 1697, a further order made by the Lords, that upon the appellant's paying to the reſpondent, or into the Court of Chancery for his uſe, they ſhould be put in poſſeſſion of the eſtate, 1 Eq. abr. 260, pl. 2. Antè, 72. S. C. Shower's Parl. Caſes, 137. S. C.

The appellants applying to the Court of Chancery for an execution of that order (the reſpondent, who was an infant, being gone beyond ſea, and his mother, who was his guardian in this ſuit, being dead) the court ſaid, they could do nothing in the matter, till a new guardian were appointed, which, as it was ſaid, could not be but by bringing the in- How a guardian is to be appointed. Gilb. Rep. 172.

fant into court, or his praying a commiſſion to have a guardian aſſigned him; and upon ſearch the appellants did not find any precedents where a guardian had been otherwiſe aſſigned; and though the reſpondent's father had, by his will, named other per-
107 ſons to * be his guardian, in caſe of the death of his mother before his age of 21; yet they (though they acted in other matters) would not intermeddle in this.

Wherefore the appellants petitioned the Lords, that receivers might be appointed to receive the rents, and pay thereout to the reſpondent the intereſt of the 4000 *l.* and the overplus to the appellant.

Upon hearing the petition, the Lords ordered proof ſhould be made in the Court of Chancery of the miſmanagement of the eſtate; and that the guardians named in the will ſhould be decreed to name a fit receiver, and if they would not, then the Chancellor to name one.

Accordingly an order was afterwards made by the Maſter of the Rolls, in the abſence of the Lord Chancellor, for a receiver to be appointed by a Maſter, who ſhould give ſecurity as uſual,

* DE 108

Termino S. Hillarii,

1699.

In Curia Cancellariæ.

Willis *verſus* Fineux. Caſe 96.

Poſt, 568. 1 Eq. abr. 257, pl. 2. 2 Wms. 146.—*è contrà*, Poſt, 572, 591.

URſula Pierce being ſeiſed in fee of . . . . . deviſed it to *Pierce Fineux*, the father, for life; and after to *Pierce Fineux* his ſon in fee; and by the ſame will deviſed 400 *l.* to *Pierce Fineux* the ſon, to be paid at 21, and made *Pierce Fineux* the father (who was her brother and heir) executor, and died, leaving 2000 *l.* perſonal aſſets, and *Pierce Fineux* the ſon an infant.

Deviſee for life, remainder over, commits a forfeiture by levying a fine, and making a mortgage, for which on ejectment the remainder man recovered, yet the mortgagee having no notice of the will, had a decree to hold, during the *life* of the mortgagor; and the rather, for that the mortgagor had made an affidavit, that there was no will, and that he was heir at law.

The father ſpent all the aſſets, and made a leaſe for years of the deviſed lands to one *John Robb*, by way of mortgage, for ſecuring 200 *l.* borrowed of him, and covenanted in the deed to levy a fine to the mortgagee, for corroborating the term, and declared, that the uſe of the fine ſhould be to the mortgagee for the term, and after to *Fineux* the father, and his heirs; and a fine was levied accordingly to *Robb*, and his heirs; and the mortgage was afterwards transferred to the plaintiff's teſtator *Fineux*.

* The ſon came of age, and brought his ejectment upon the forfeiture committed by his father, by levying the fine, and recovered; 109

recovered; and now the plaintiff brought this bill to be relieved.

The Maſter of the Rolls decreed, that the mortgagee ſhould hold and enjoy againſt the ſon, during the life of the father, and the father to pay coſts, and be foreclоſed, unleſs he paid the money.

Note; The father on making the mortgage, had made affidavit, that *Urſula Pierce* died inteſtate, though he had proved her will long before; and that he knew of no incumbrances upon the eſtate.

Caſe 97.

† Jackſon *verſus* Farrant.

§ Poſt, 348. 483. 562. 1 Eq. abr. 268, pl. 8. S. C. 8 Vin. abr. 402, c. 24. 461, c. 16. 16 Vin. abr. 448, c. 5. S. C. 2 Vern. 424. S. C. 1 Vern. 255 l. 324 l. 462 P. 2 Vern. 72 P*. 181 P*. 199 l. 348 P*. 508 l. 673 l. 758. 766 l. 1 Wms. 566 l. 448 P. 783 l. 2 Wms. 513 P. 610 l. 3 Wms. 120 P*. 172 l. 414 P* Caſes temp. Talb. 117 P*. Comyns, 716 l. 1 Vez. 44. 118 l. 208 P. 2 Atk. 123. 128 l*. 184 P. 3 Atk. 114 l. 319 l*. 416 P. 2 Brown's Parl. Caſes, 347 l. Brown's Rep. 182 l. 319 l*. 163 P. 191 l*. 298 l*.—*contrà*, Poſt, 140. 195. 213. 226. 267. 290. 1 Vern. 204. 335 P. 2 Vern. 92 P. 208 l*. 617 P*. 1 Wms. 401 P. 2 Wms. 610 P. 276 P. 3 Wms. 134 P. Caſes temp. Talb. 193 P. 2 Vez. 209 P. 261 l. 1 Atk. 361 P. 482 l*. 500 P. 502 l*. 510 l. 555 P*. 3 Atk. 219 l*. 504 l. Brown's Rep. 303 P. 395 P.

§ Thoſe caſes marked with P, are caſes of portions or legacies from a parent to a child.

Thoſe with l, of legacies from a ſtranger to a child.

Thoſe marked with an aſteriſk, where the portions or legacies are charged upon land or a mixed fund.

A portion deviſed to a daughter out of a real and perſonal eſtate, to be paid at 21, without ſaying, or marriage;

A Portion was deviſed to a daughter, to be raiſed out of a real and perſonal eſtate, and to be paid at 21; the daughter marries, and dies before 21, leaving a child.

the daughter marries, and dies before 21, yet *by reaſon of the marriage it was then due, marriage being the cauſe of portions.*

It was inſiſted upon, that the portion was not to be raiſed, nor was ever due, becauſe ſhe died before the time of payment; and the marriage in this caſe is no more to the payment, than any other thing would have been; and though it might have been more reaſonable to have had the teſtator to have limited it to be paid at 21, or marriage, yet he has not ſo done; and the

† This decree was reverſed in part in the Houſe of Lords, as to the ſale of the intailed eſtate, but without prejudice to the general queſtion, 1 Brown's Parl. Caſes, 61.—See the above caſe more amply and accurately ſtated, ibid.

court muſt judge according to what is done, and not according to what had been more reaſonable to have been done.

Cur. Let an account be taken of the eſtate, and then the court will give its opinion, but my Lord Chancellor inclined ſtrongly, that the portion was payable, and ſaid, the reaſon of all the caſes go that way; for they go upon this, that *there being no marriage, that did not happen, which was the cauſe of the portion.*

110 *DE

Termino Paſchæ,

1700.

In Curia Cancellariæ.

Caſe 98.

Danby *verſus* Lawſon.

1 Eq. abr. 354, pl. 3, 4. S. C. Pract. Reg. 21.

If one be taken up on an attachment, either in proceſs or in execution after a decree; yet in both caſes on his appearing before the Regiſter, he is to be diſcharged, and to anſwer the interrogatories at large, not in cuſtody; and if he be continued in cuſtody, the court on motion and appearing before the Regiſter, will diſcharge him.

DEFENDANT, who was a feme covert, was taken upon an attachment for non-performance of a decree, and the officer refuſed to bring her before the Regiſter to appear, but carried her to *Newgate*, and now ſhe moved the court that ſhe might appear before the Regiſter, and be diſcharged out of cuſtody; and the queſtion was, Whether by the courſe of the court ſhe is to be diſcharged upon her appearing, or to anſwer in cuſtody?

It was agreed, that upon an attachment in proceſs, ſhe muſt be at large upon her appearing, but the plaintiff's counſel ſaid it was otherwiſe in execution; but all the regiſters and ancient practiſers were of opinion that it was the ſame in both caſes; and Mr. *Guidott* the Regiſter cited the caſe of one *Swain*, who was

111 taken up for not paying 80 *l.* and diſcharged * upon appearing, and that upon debate; but on an attachment in execution the ſheriff may inſiſt upon ſecurity proportionable to the duty, but in proceſs it is only 40 *l.* penalty; and upon appearing ſhe is to be

at

at large, and not to anſwer in cuſtody, though the interrogatories be filed; and upon the Regiſter's certificate that the party has appeared, the ſheriff is to deliver up the bond.

The Maſter of the Rolls ſaid there was undoubtedly a difference between a contempt to the honour of the court, and the breach of a decree; upon the firſt the party is to anſwer *in Vinculis*, but not upon the latter; ſo ſhe was diſcharged (but interrogatories being filed) ſhe was ordered to anſwer in four days, or ſtand committed.

Rockley *verſus* Kelley. Caſe 99.

1 Eq. abr. 126, pl. 12. S. C. but not S. P.

Whether exceptions to a decree of the Commiſſioners of Charitable Uſes may be heard before the Maſter of the Rolls, by the ſtatute 43 *Eliz.* c. 4. or only before the Chancellor. *Vide* 3 Blackſt. Com. 427.

A Decree was made by the Commiſſioners of Charitable Uſes, and exceptions were taken to it, and they now came on before the Maſter of the Rolls, and he and moſt of the bar were of opinion, that by the ſtatute of *Eliz.* the Maſter of the Rolls may hear an appeal, as the Chancellor may, and may affirm the decree and give coſts, notwithſtanding the ſtatute mentions only the Chancellor; but Mr. *Edwards* the Regiſter ſaid, it had always been an exception, and therefore the Maſter of the Rolls would do nothing in it.

Shute *verſus* Shute. Caſe 100.

9 Mod. 43. S. C. 2 Eq. abr. 157, c. 1. 3 Wms. 276. 3 Atk. 547 to 550. Bunbury, 16.

Divorce *a menſa & thoro* if it continued during the coverture; equity will not aſſiſt the wife in recovering her dower, but will leave her to the law; neither will the Spiritual Court grant her adminiſtration, nor Chancery decree her a diſtributive ſhare.

THE Bill was to have dower of her huſband's real eſtate, and a ſhare of his perſonal eſtate for herſelf and child by him, he dying inteſtate; and adminiſtration granted to another, becauſe there was a divorce between her huſband and her, *a menſe & thoro*.

Maſter of the Rolls. As to the dower, whether you are entitled to it, go to law, there being no impediment, and therefore as to that, the bill muſt be diſmiſſed.

* The granting adminiſtration is in the Eccleſiaſtical Court, but the diſtribution does more properly belong to this court; but ſince 112

ſince in the Eccleſiaſtical Court ſhe is not ſuch a wife as is entitled to adminiſtration, I will decree no diſtribution, therefore the bill muſt be diſmiſſed as to that too; and if you can repeal that ſentence, you will then be entitled to diſtribution.

Note; Friday 26 *of* April, 1700, *the Earl of* Jerſey, *principal Secretary of State, was ſent to fetch the Great Seal from my Lord Chancellor, but having no warrant in writing to demand it, my Lord Chancellor refuſed to deliver it; but the next day the Secretary came with a warrant, and then the ſeal was delivered to him; and* Sunday *the 5th of* May *the cuſtody thereof was committed to the two Chief Juſtices and Chief Baron, with a ſpecial commiſſion to ſeal writs; and they ſat at* Serjeant's-Inn *the* Monday *following to ſeal writs; and the Maſter of the Rolls ſat in the Court of Chancery to hear cauſes, by virtue of a commiſſion, in the uſual form to hear cauſes in* Abſentia Cancellarii; *and afterwards the cuſtody of the Great Seal was given to Sir* Nathan Wright, *Knight, one of the King's Serjeants.*

Termino S. Trinitatis,

1700.

In Curia Cancellariæ.

Ball *verſus* Burnford. Caſe 101.

Eq. abr. 354, pl. 5. S. C. 2 Eq. abr. 667, c. 1.

The wife joins with the huſband in letting in an incumbrance on her jointure lands, and barring the eſtate tail, and then limits the uſes to the huſband for life, remainder to the wife for life, remainder to their daughters: the daughters are not purchaſers, ſo as to ſhut out a judgment. Creditor of the huſband's antecedent to the barring of the eſtate tail, but the limitations to them voluntary, unleſs the conſideration of the wife's parting with her jointure, had extended alſo to the limitation to the daughters.

Edmund Anderſon being tenant for life of lands, then as to part to his wife for life for her jointure, then to the heirs male of their two bodies, acknowledges a judgment to the plaintiff, and then enters into covenants with *J. S.* that he and his wife would join in a fine, which ſhould be in the firſt place to *J. S.* and his heirs, by way of mortgage, for ſecuring a ſum of money, then to the huſband for life, then to the wife for life for her jointure, then to the ſons of them two in tail, then to the daughters in tail; and a fine was levied accordingly: and there were other incumbrances upon the eſtate, prior to the firſt ſettlement, which *J. S.* the mortgagee, or the defendant *Burnford* (for whom he was a truſtee) purchaſed in.

Edmund Anderſon died without iſſue male, leaving two daughters of that marriage, who were likewiſe defendants.

* Plaintiff brought his bill to be let into the benefit of his judgment, paying the mortgagee what he had really paid for that 114

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by the fine; the eſtate tail was barred, and the judgment let in, and this ſettlement on the daughters was voluntary.

It was admitted, that the fine had barred the eſtate tail created by the firſt ſettlement, but inſiſted that the daughters were purchaſers by the mother's joining to bar her jointure, and letting in the incumbrance; and that that conſideration did extend to the eſtate of the daughters as well as her own.

My Lord Keeper was of opinion, that this might have been made a good conſideration for both; but it was not expreſſed in the deed to be any conſideration for ſettling the eſtate upon the daughters, but was a voluntary gift of the wife to her huſband, and therefore the daughters eſtate muſt be taken to be voluntary; and ſo a judgment creditor ought to have the aſſiſtance of this court before them.

Caſe 102.

Spicer *verſus* Hayward.

1 Vern. 483. 2 Vern. 187. 242. Gilb. Rep. 9. 2 Wms. 432. 3 Wms. 294. 339. Caſes temp. Talb. 153. 1 Vez. 254. 2 Vez. 160.

Plaintiff had ſeduced his wife's ſiſter, and had ſeveral children by her, and gave her ſome bonds for payment of money, as a proviſion for her and her children; and theſe bonds being ſued, he brought a bill, ſuggeſting that the bonds were given for no valuable conſideration, but was diſmiſſed with good coſts.

THE plaintiff had ſeduced his wife's ſiſter, and had ſeveral children by her, and had given her ſome bonds for payment of money, which were intended as a proviſion for her and the children, and afterwards gave her a weekly allowance: one of the bonds was put in ſuit againſt him, and he brought this bill, ſuggeſting that the bonds were not given for money lent, or any valuable conſideration, and beſides that they were ſatisfied (meaning the weekly payments) and upon the defendant's anſwer, and plaintiff's letters, the caſe appeared *ut ſupra*.

My Lord Keeper ſaid he could do no more againſt the bail than decree the payment of what was due on the bonds for principal and intereſt, with good coſts, by a *ſhort day, or elſe the bill to be diſmiſſed with coſts, and ſaid it was a pity he could do no more.

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Speering

Speering *verſus* Lynn & Ux' & Field & al'. Caſe 103.

2 Vern. 376. S. C. 1 Eq. abr. 30, pl. 6. S. C.

A miſtake in the title of an order amended, tho' to charge a ſurety, who gave a recognizance to abide the order of hearing.

DEFENDANT gave ſecurity in the uſual manner, to abide the order on hearing; and then a decree was made, and a report upon it, and the recognizances ſued againſt *Field* the ſurety for non-performance, who pleads in abatement that there was no order on hearing; they reply, and ſet forth the order on hearing the report, the order for confirming *Niſi*, and the order for making that abſolute; but defendants rejoin, that in the title of the two laſt orders the words *& ux'* were omitted, but the body of them was right, and ſo they were not orders in that cauſe; yet on motion the title of the orders was amended by order *Niſi*, *&c.*

It was now inſiſted that they ought not againſt the defendant, who was but a ſurety, and cited the caſe of *Northcott* verſus *Northcott* this term, where, on a decree againſt baron and feme, all the proceſs of contempt was right, till the ſerjeant at arms, and the order for that was only againſt the baron, and ſo was the ſequeſtration; and after the huſband's death a ſequeſtration went againſt the wife's jointure, and it was moved to be amended, but the party could not prevail.

On the other ſide it was ſaid, that this was only the clerk's miſtake, and was to carry on the juſtice of the court, and therefore ought to be amended, and cited the caſe of *Earl* and *Earl* this term, where affidavit was ordered to be filed after, to ſupport a ſequeſtration, being really made before the ſequeſtration, and the order of amending was made abſolute in the principal caſe.

* Procter *verſus* Cooper. Caſe 104.

2 Vern. 377. 1 Eq. abr. 314, pl. 3. S. C. 2 Atk. 333.

Mortgagee enters, and the profits are not ſufficient to anſwer the intereſt, yet the arrears ſhall not carry intereſt, but the coſts and charges muſt.

HEnry *Gaſcoign*, in 1641, made a mortgage in fee for 300 *l.* to *Gilbert Cooper*, of lands of about 30 *l. per ann.* in 1652; the mortgagee took poſſeſſion, and in 1660 deviſed the lands to *Anthony Cooper*; in 1686, the deviſee brought a bill to foreclose, to which the defendants pleaded a ſettlement prior to the mort-

gage, but that was found to be fraudulent; and the wife of the mortgagor had recovered a third part as dower againſt the mortgagee, ſo that the profits did not anſwer the intereſt of the money, which was then 8 *l. per cent.* and there had been infancies on the plaintiff's part for ſeveral years.

Maſter of the Rolls. The plaintiff muſt redeem, and ſhall pay 8 *l. per cent.* only to the time of the ordinance of parliament that reduced the intereſt of monies; and though the profits were not ſufficient to anſwer the intent, yet the arrears cannot carry intereſt, but the coſts and charges muſt.

105. David Eyton *verſus* John Eyton & Jane Ux' & An. Eyton.

2 Vern. 380. S. C. Eq. abr. 169, pl. 1. S. C. † 2 Eq. abr. 286, c. 1. 1 Wms. 733. 2 Wms. 748. 3 Vez. 235. 389. 505. 2 Vez. 233.

Counterpart of a ſettlement admitted ſufficient evidence of the ſettlement, and a conveyance decreed purſuant to it.

Thomas Eyton had three ſons, *Benjamin*, *Randall*, and *David*, and the 6th of *October*, 2 *Car.* 1. made a ſettlement of all his lands to the uſe of himſelf for life; remainder to the uſe of his wife for life: then as to part, to the uſe of *Benjamin* and the heirs male of his body; remainder to *Randall* and the heirs male of his body; remainder to *David* and the heirs male of his body: and as to the other part, to *Randall* and the heirs male of his body; remainder to *Benjamin* and the heirs male of his body; remainder to *David* and the heirs male of his body: and as to the other part, to *David* and the heirs male of his body; remainder to *Benjamin* and * the heirs male of his body; remainder to *Randall* and the heirs male of his body; with remainder of the whole to *Thomas* in fee.

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Benjamin was a lunatic, and had no iſſue male, and only two daughters, *Jane* and *Anne* (defendants); *Randall* died without iſſue; *David* had iſſue *David* (the plaintiff) and *John* (the defendant) who married *Jane* the eldeſt daughter of *Benjamin*.

David exhibited his bill againſt *Benjamin* and *John*, and *Jane* his wife, ſetting forth, that *Thomas* his grandfather had made ſome

† Theſe authorities are referred to, for the purpoſe of ſhewing what evidence the court requires in caſes where inſtruments have been loſt, ſuppreſſed, or deſtroyed.

ſettlement,

ſettlement, whereby part of the eſtate did then belong to him, and charged that the ſettlement was come to the defendant's hands, and prayed a diſcovery of it.

John anſwers, and ſets forth, that he had ſuch ſettlement in his cuſtody, and ſets forth the limitations to be *ut ſupra*, but that he could not part with it, becauſe he was adviſed it did belong to *Benjamin*.

The cauſe reſted upon this anſwer ſeveral years, and *Benjamin* died without iſſue male; and his ſaid two daughters were his co-heirs, and alſo heirs to *Thomas* the grandfather.

Then the plaintiff amended his bill, and made *Anne* a party, and charged further, that in the ſettlement by *Thomas* there was a proviſo, that if any of his ſons died without iſſue male, ſo that the land ſhould come to any of the brothers, they ſhould pay to the daughter of ſuch brother, ſo dying, ſo much, and that he had tendered, and was ready to pay according to the proviſo.

To this amended bill *John* anſwers, and ſays, he does not underſtand the limitations of ſettlements, and that he does not know whether he had ſet them forth right in his former anſwer; that he knew of no other ſettlement but what was mentioned in his former anſwer, which he had ſeveral years ſince delivered to *Benjamin*, and had no copy of it.

* *Jane* his wife anſwered by herſelf apart, and *Anne* anſwered, and by their anſwer inſiſt upon their title, as heirs to *Benjamin*, and deny that they ever ſaw or heard of any ſettlement made by *Thomas* the grandfather. 118

The plaintiff had renewed *a counterpart* of the deed of ſettlement, and there was a proviſo, as was mentioned in the amended bill; and there was ſome proof that ſome part of the land had been ſold by *Randall*, and enjoyed accordingly, but no other proof of the ſettlement.

At the hearing it was inſiſted, that the huſband's anſwer, *whereby he had confeſſed the ſettlement*, was no evidence againſt his wife (being in a matter of inheritance) and that without other evidence of the ſettlement they could not make uſe of this, which they pretended to be a counterpart; yet the Maſter of the

Rolls decreed a conveyance to the plaintiff, and an account of the rents and profits; and on appeal this decree was confirmed by my Lord Keeper, who thought, as this caſe was, the counterpart would of itſelf be evidence enough at law of the ſettlement. *Sed quære de hoc.*

Caſe 106. Burnett *verſus* Kinaſton.

Antè, 63, and references. 1 Eq. abr. 69, pl. 5. S. C. 70, pl. 15. 2 Freeman, 239. S. C. 2 Vern. 68. 2 Vern. 401. S. C. Gilb. Rep. 98. 2 Wms. 111. Caſes temp. Talb. 168 to 170. 1 Atk. 280. 459. 2 Atk. 207. Poſt, 417.

A feme covert being entitled to 1400*l.* on a mortgage in fee, huſband articles to lay out this money in a purchaſe of lands, to be ſettled as a proviſion for him and his wife, and their iſſue: the wife dies without iſſue; the huſband takes adminiſtration to her, and by will deviſes this money to the plaintiffs before payment of it, and dies. On a bill brought againſt the adminiſtrator *de bonis non*, &c. of the wife, held there could be no relief, the law being with the defendants. This money belonged to the adminiſtrator *de bonis non*, &c. of the wife, and is diſtributable amongſt her next of kin.

THE plaintiff's father had married the defendant's aunt for his ſecond wife, and ſhe was intereſted in ſeveral mortgages for ſeveral ſums of money, amounting in all to 3200 *l.* (which was her fortune) among which, one was a mortgage in fee for 1400 *l.* from her brother the defendant's father; after marriage, the plaintiff (who was a ſoldier of fortune) executed articles * between himſelf of the one part, and ſome of his wife's relations of the other part, whereby he agreed that he would take but 200 *l.* of his wife's fortune to his own uſe, and that the remaining 3000 *l.* of his wife's fortune ſhould be inveſted in a purchaſe of lands, which ſhould be ſettled to the uſe of himſelf for life, then to the uſe of his wife for life, then to the firſt and other ſons of the marriage in tail male, with a term to truſtees to raiſe portions for younger children; then to the heirs of the body of the wife, and then to the right heirs of the huſband.

The wife was no party to theſe articles, and ſoon after died without iſſue, ſo that all the remainders mentioned in the articles to the huſband's remainder in fee were ſpent, and the huſband ſurvived and took adminiſtration to her, and came to an account with *Kinnaſton* the mortgagor for the 1400 *l.* and he promiſed to pay the money within three months, and in conſideration thereof had an abatement of 50 *l.* but he did not pay the money at the time; and before it was paid *Burnet* the huſband died, but before his death made his will, and thereby deviſed this money (after debts

debts paid) to be equally divided amongſt the plaintiffs, who were his children by his firſt wife.

Adminiſtration *de bonis non, &c.* to the ſecond wife was granted to the defendant *Mills*, and the queſtion was, Whether theſe articles, made by *Burnett after his marriage*, were ſuch an alteration of the property of the wife's money, as that the huſband had power to diſpoſe of it by his will, or whether it belonged to the adminiſtrator *de bonis non, &c.* of the wife, and was to be diſtributed amongſt the next of kin?

For the plaintiffs it was argued, that though this mortgage were an eſtate of inheritance in the wife, yet being but a ſecurity for money, it is in conſideration of equity a chattel intereſt only, and ſhall go to the executor, and not to the heir, and is therefore diſpoſable by the huſband without his wife, as other chattel * in- 120
tereſts of hers are; and nobody can deny but that a huſband can aſſign over or releaſe a thing in action of his wife's; and the wife's conſent or joining in the articles would not have altered the caſe, for of the perſonal things of the wife, the huſband has a diſpoſing power without her conſent; and if this be not a good diſpoſition, then neither the huſband nor wife, or both, can after marriage diſpoſe of a perſonalty of the wife; and whereas it has been ſaid on the other ſide, that there is a difference between a temporary intereſt and an abſolute intereſt, and in this caſe the intereſt of the huſband is only a temporary intereſt, that diſtinction is of no force where the diſpoſition is made during the continuance of ſuch temporary intereſt, as it was in this caſe; and it is not the ſame as if it had been a diſpoſal by will, which it is urged would not have been good, for there the intereſt of the huſband is ſpent, and the wife in by ſurvivorſhip before his will can take place; as if there be two joint-tenants, and one deviſes his moiety, and dies, this court will not help againſt the ſurvivor; but if in his life-time he had agreed to aſſign over, though voluntarily, this court would have made it good.

On the other ſide it was urged, that they had the law with them, and no reaſon for a court of equity to interpoſe; that the articles were after marriage, and voluntary, and that the wife

had done nothing to bind herſelf; that the huſband, notwithſtanding the articles, might have ſold or aſſigned; or if the articles would have bound him, yet they could not bind his wife, for he can only bind her by executing his legal power, *viz.* by releaſing or receiving the money; and his power was but temporary, and not abſolute, and he had made no farther diſpoſition during the time he was adminiſtrator to his wife; that notwithſtanding theſe articles, the wife muſt have joined in ſuit for this duty, and the benefit of it would have ſurvived to her; and the
121 legal intereſt of a feme covert cannot be bound, but by a * fine, nor the equitable intereſt without a decree. And Major General *Egerton*'s caſe was cited, where a mortgage went to a wife who ſurvived; and a caſe where it was ſaid that a legacy being deviſed to a feme covert, her huſband afterwards became a bankrupt, and the Commiſſioners aſſigned over this legacy, and then the bankrupt died, and decreed the wife ſurviving ſhould have the legacy.

Lord Keeper. If a huſband aſſigns a bond of his wife's for a valuable conſideration, this aſſignment will not bind the wife if ſhe ſurvives; and ſo it is in this caſe, for the wife claims paramount. If one joint tenant grants a rent-charge, can the grantee come againſt the ſurvivor to make it good? Surely no. Perhaps an agreement to aſſign might be otherwiſe, though I think it would not: here is nothing but the act of the huſband without any conſideration, and the plaintiffs have no title; let the bill be diſmiſſed.

* DE 122

Termino S. Mich.

1700.

In Curia Cancellariæ.

Foſter *verſus* Foſter. Caſe 107.

1 Eq. abr. 365, pl. 7. S. C. 2 Vern. 386. S. C.—*Contra*, 2 Vern. 382. 1 Ch. Caſes, 185 †.

Deviſee of a rent charge of 100 *l.* *per ann.* to be iſſuing out of the rents and profits of lands which were worth but 50 *l.* with power of the deviſee ſhall diſtreſs, enters into the lands, and by will deviſes the arrears of the ſaid rent charge, recover in equity.

William Foſter by will deviſes an annuity of 100 *l.* *per ann.* to *A.* his father, for life, to be iſſuing out of the rents and profits of *Black Acre*, and to be paid half yearly, with clauſe of diſtreſs, and deviſes *White Acre*, and alſo *Black Acre*, charged with the ſaid annuity, to the defendant, his nephew, and his heirs.

A. entered into *Black Acre*, and received the profits till his death (which was five years) not being ſufficient to anſwer above 50 *l.* *per ann.* of the annuity, and then by will, reciting the annuity in arrear, deviſes the ſaid arrears to the plaintiff his wife, and made her executrix; and ſhe inſiſted, that this was alſo a charge on *White Acre* by the laſt clauſe (but that was given up) at leaſt *Black Acre* was chargeable, and the plaintiff ought to hold over, becauſe the 100 *l.* *per ann.* was to be ſatisfied before the defendant had any thing.

† See the caſe of *Benſon* v. *Baldwin*, 1 Atk. 598, under what circumſtances equity will grant relief, where a bill is brought for rent.

On the other ſide, it was ſaid, that the deviſe of the annuity out of the rents and profits, &c. could at moſt amount but to a
123 deviſe of the land itſelf for life, * though if it had been a ſum in groſs, it would be otherwiſe; that it was a legal charge, and the plaintiff's remedy was by diſtreſs, if that was not barred by *A.*'s entry, which was his own fault.

But it was decreed for the plaintiff; for his intent was plain, that his father ſhould have 100*l. per ann.* for his proviſion; that a deviſe of the rents of lands is the ſame as a deviſe of the lands themſelves, and it is the ſame thing alſo as to the profits, and there can be no more iſſuing out of lands than the whole value, and the court will decree a ſale of the lands to raiſe a ſum deviſed out of lands for children at ſuch an age, if the profits will not do it, and the deviſe of *Black Acre* (charged with the ſaid annuity) charges it in his hands by the ſaid words, for it could not be charged before.

Caſe 108. Welby *verſus* Thornagh & Ux' & econt'.

1 Eq. abr. 133, pl. 18. S. C.
2 Vern. 700.
1 Wms. 288.—*contrà*, Eq. abr. 406, pl. 4.
2 Wms. 270.
2 Atk. 424.
3 Atk. 17.

WELBY's bill was to have the defendants (the wife being aunt and heir to Sir *Richard Earl*) join in a ſale of his lands, which he had deviſed to the plaintiff (his uncle by his mother's ſide) charged with payment of his debts. *Thornagh*'s bill was to ſet aſide the will, as obtained by fraud and circumvention, and to have the deeds and writings.

A will as well as a deed may be ſet aſide in Chancery for fraud or circumvention.

The court was clear of opinion, that a will as well as a deed may be ſet aſide in this court for fraud and circumvention, but that no ſuch thing was made out in this caſe; but the heir inſiſting on it, it was directed to an iſſue *deviſavit vel non*, and the bills to be retained in the mean time; my Lord Keeper was alſo clear of opinion, that if a verdict went for the will, the heir, though a feme covert, might be decreed to levy a fine, and join in the ſale.

Moyſe

* Moyſe *verſus* Gyles. Caſe 109.

2 Vern. 385. S. C. otherwiſe ſtated. Eq. abr. 293, pl. 2. S. C.

TWO joint tenants of a church leaſe, one whereof being taken ſick in a journey, to ſever the jointure, and provide for his wife, ſends for the ſchoolmaſter of the town (who was the only perſon he could get to come to him) and acquainted him with his intentions, and deſired him to prepare an inſtrument for that purpoſe; the ſchoolmaſter drew a kind of deed of gift of the leaſe from the ſick man to the wife, which he executed, and died; and this being to the wife, and void in law, ſhe would have made it good here, but was diſmiſſed, being voluntary, and without conſideration.

One joint tenant makes a deed of gift of his moiety to his wife, as a proviſion for her, and with intent to ſever the jointure; yet being made to the wife herſelf, and ſo void in law, and without conſideration, equity cannot relieve.

Colcheſter *verſus* Arnot. Caſe 110.

2 Vern. 383. S. C.

LESSEE of a prebend makes an under leaſe, and the leaſe being pretty far ſpent, he requeſted the tenant to ſurrender, to enable him to renew, and offered to give any ſecurity to grant him a new leaſe for ſo many years as he had to come in his old one; but the tenant was obſtinate, and would not, unleſs his landlord complied with ſome demands of his, upon which he brought this bill to enforce him to compliance.

Leſſee of a prebend makes an under leaſe, and the leaſe being far ſpent, and the leſſee refuſing to ſurrender, in order to enable him to renew, though he offered ſecurity to make up the tenant's leaſe again; the leſſee brings his bill to compel a ſurrender, but is diſmiſſed, *there being no agreement in the leaſe for that purpoſe.*

But my Lord Keeper ſaid, though it were a benefit to the plaintiff, and no prejudice to the defendant; yet there being no agreement in the deed for that purpoſe, he could do nothing in it, and likened it to bills of conformity, and bills for incloſing a common, in which caſes, if one will ſtand out, they cannot be decreed.

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Caſe 111.

* How *verſus* Nicholl.

A Man had a term in groſs, and then purchaſed the inheritance, and the term is declared to attend the inheritance; then he becomes receiver of the king's revenue; he is liable from the time of his becoming receiver, and the king ſhall have the benefit of the term; but if the term had been mortgaged to one, who had *no notice* of its attending the inheritance, he ſhould have held it againſt the king.

See S. Ca. 170.

Caſe 112.

Mitchell *verſus* Eades.

2 Vern. 391. S. C. otherwiſe ſtated; it is there ſaid to be *an aſſignment*. 2 Vern. 595. Eq. abr. 45. S. C.

One being indebted to *B.* makes a letter of attorney to him to receive all ſuch wages as ſhall after become due to him, then goes to ſea, and dies; this authority is determined ſo, that he cannot compel an account of wages, if any due at making the letter of attorney, much leſs of what after became due; but the adminiſtrator muſt pay according to the courſe of law.

A Sea Captain being out of ſervice, makes a letter of attorney irrevocable to the plaintiff, to receive all ſuch wages and pay as ſhall after become due to him; then he goes into ſervice, and dies, there being at the time of his death wages due to him: the defendant, as principal creditor, takes out adminiſtration to him; and the plaintiff, who was a creditor likewiſe, brought this bill to have an account and payment of the wages, and likewiſe to have a ſatisfaction for his debt.

The Maſter of the Rolls was of opinion, that though there had been wages due at making of the letter of attorney; yet he could not have decreed the wages to the plaintiff againſt the reſt of the creditors, much leſs as this caſe is; therefore decreed the parties to go to an account, and the defendant to pay according to the courſe of law, but diſmiſſed the bill as to the demand of wages.

Champernoon

* Champernoon *verſus* Gubbs. Caſe 113.

2 Vern. 382. S. C. Antè, 122.

A Rent charge was granted the plaintiff, with clauſe of diſtreſs, and a covenant in the deed, that the land ſhould be liable to the diſtreſs; the grantor died; the defendant, who thereby became owner of the land, was an infant, and his mother, under whoſe guardianſhip he was, ſuffered the rent to run greatly in arrear, and ſeveral ſuits were brought at law; and by reaſon of the frequent diſtreſſes and ſuits, it was difficult to get tenants for the lands, and the beſt was not made of them, nor ſo much cattle kept on the lands as elſe would have been; and after the defendant came of age, the rent, for the reaſons aforeſaid, came more and more in arrear.

One having granted a rent-charge with clauſe of diſtreſs, and covenant that the land ſhould be liable to the diſtreſs, dies, and the rent-charge being greatly in arrear, and no diſtreſs to be had, and the land untenanted; yet the court would not decree the grantor to ſet out a diſtreſs, or that the grantee ſhould hold the land till ſatisfied, nor vary the agreement of the parties.

The plaintiff pretending that no ſufficient diſtreſs could be had on the land, brought this bill to have a decree to hold the land till he ſhould be ſatisfied; and that the land might be decreed to ſtand charged with the arrears and growing rent; but the bill was diſmiſſed, becauſe it did not appear that there was any fraud in the defendant to prevent the plaintiff of his legal remedy, which might entitle this court to give him another.

The plaintiff petitioned for a re-hearing, and on the 17th of *July* the cauſe was heard before the Lord Keeper.

It was ſaid for the plaintiff, that if the rent had been granted without any clauſe of diſtreſs, or other remedy at law, he might have had relief here; and ſhall we be in a worſe condition, becauſe ſome remedy at law is provided, though not a ſufficient one; and the caſe of Dr. *Thorndyke* and *Allington*, 26 *Jan.* 18 *Car.* 2. *Morgan* verſus *Cough*, and *Morgan* verſus *Heron*, were cited, where there was a deviſe of a rent, and no remedy at law, * and poſſeſſion of the land was decreed here; and it was ſaid, where a bond has been entered into, with condition to

convey

convey lands, this court will decree the conveyance, though the parties have agreed to the meaſure of the damages.

On the other ſide, it was urged, that the caſes cited were not like this here; you aſk to alter the nature of the thing, which is a rent, and a certain remedy for it by diſtreſs; and you aſk the land, inſtead of the rent; and if you would have us decree to ſet out a diſtreſs ſufficient to anſwer all the arrears, it is the ſame thing as a decree againſt us to pay the money, which we cannot in juſtice be decreed to do.

My Lord Keeper continued his former opinion, and cited the caſe of the Earl of *Warrington* verſus *Langham* againſt the plaintiff, and affirmed the decree.

Caſe 114. Cutterback *verſus* Smith.

Poſt, 136. Gilb. Ch. 319. 1 Vern. 63. 2 Vern. 248. 405. 1 Roll's abr. 920, pl. 6. 16 Viner, tit. Payment, 280. Hardreſs, 405. 1 Chan. Caſes, 275. 248. Hobart, 265. 1 Wms. 429. 1 Strange, 1270. 1 Atk. 208. 420.—*è contrà*, Poſt, 408. Cro. Car. 161. Dyer, 371. Sir T. Jones, 26. 1 Leon. 220. 2 Mod. 286. 10 Mod. 427. 2 Wms. 416. 3 Wms. 341. Caſes temp. Talbot, 220. 2 Atk. 50. Brown's Rep. 135.

Where lands are deviſed to executors, to be ſold for payment of debts, the money becomes legal aſſets, and debts ſhall be paid in a courſe of adminiſtration.

A Man deviſed lands to *A.* and *B.* in truſt to be ſold for the payment of his debts, and makes the ſame perſons executors, and the only queſtion was, Whether bond debts ſhould have a preference, or all debts be paid *pari paſſu?* The difference was taken, when the ſame perſons that are truſtees to ſell the lands, are executors likewiſe, and where not, for in the former caſe, after the land is ſold, it is aſſets, even at law; and therefore to decree them to pay otherwiſe than according to the legal courſe, would be to decree a *Devaſtavit*.

My Lord Keeper took time to conſider of it, and afterwards delivered his opinion, that bond debts muſt be preferred, and the 23d *December* 1700, at *Powis Houſe*, in the caſe of † *Bickman verſus Freeman*, was a like decree and difference.

† Poſt, 136.

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Caſe 115. * Sir John Champant *verſus* Lord Ranelagh.

LORD *Ranelagh* was vice treaſurer of *Ireland*, and Sir *John Champant* was his deputy receiver there, and my Lord was indebted to him upon his account, and gave him a bond for the

the money; and it was then agreed between them, that three fourths of what he ſhould receive from my Lord's fees, ſhould be applied in diſcharge of the bond; but afterwards my Lord drew bills on him, for ſums which amounted to more than all the fees he had received, and Sir *John* paid the bills; and the queſtion was, Whether this ſhould be adjudged a waiver of the agreement by my Lord, or conſidered as a folly in Sir *John* to have paid theſe bills; and therefore he to be allowed no intereſt on the bond, becauſe he might have applied this money to diſcharge the bond.

My Lord Keeper was of opinion, that the drawing theſe bills, and paying them, did not amount to any waiver or alteration of the agreement; and therefore Sir *John*'s receipts muſt ſink the intereſt upon the bond.

Note; The bond was made in *England*, and ſent over to my Lord's correſpondent in *Ireland*, and the money to be paid there, and it was not mentioned what intereſt ſhould be paid; and my Lord Keeper was of opinion, that it ſhould carry *Iriſh* intereſt.

A bond made in *England*, and ſent over to the obligee in *Ireland*, the money to be paid there, held it ſhould carry *Iriſh* intereſt.

† 2 Vern. 395. S. C. and P. 2 Atk. 382. 465.—See alſo, 1. Wms. 696. 2 Wms. 88.

Harvey *verſus* Eaſt-India Company.

Caſe 116.

2 Vern. 395. S. C

THE plaintiff had a decree againſt the defendants for a great ſum of money, and ſerved them with a writ of execution in the uſual form; and they * not performing the decree, a *Diſtringas* (the next proceſs againſt a corporation)

After ſervice of a writ of execution of decree againſt a corporation, the next proceſs is a *Diſtringas*, and after that a ſequeſtration, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *Diſtringas*, which iſſues for that very purpoſe, to compel them to appear; but the appearing being paſt, the proceſs muſt go on, becauſe the appearance being only in favour of liberty, can be of no ſervice to a corporation, which cannot be committed.

† *Pierſon* v. *Garnet* & al', determined at the Rolls, *March* 6, 1786.

The teſtator, Dr. *John Garnet*, late biſhop of *Clogher* in *Ireland*, who uſually reſided in that country, and died in *Dublin* poſſeſſed of a conſiderable fortune, conſiſting of *Engliſh* and *Iriſh* property, bequeathed numerous legacies, ſome of which were given with a direction to be paid in *ſterling* and *Engliſh* money; others generally, without any ſpecification: the queſtion was, Whether the latter ſhould be paid in ſterling or *Iriſh* currency? It was held, in compliance with the authority of *Drake* v. *Saunders*, 2 Atk. 465, that they ſhould be paid in *Iriſh* currency.

was awarded, and 40*s.* iſſues returned, and after, on a motion, a ſequeſtration was ordered *niſi*, *&c.* and now they prayed to enter their appearance with the Regiſter upon the *Diſtringas*, and to diſcharge the ſequeſtration.

It was urged, this might well be done, becauſe it was only a contempt, from which a corporation ought to have liberty, and an opportunity to clear themſelves, as well as a common perſon; and though they cannot anſwer the contempt on oath, nor be committed if found againſt them, yet there is no reaſon why they ſhould not have an opportunity to defend themſelves. A peer ſhall conteſt a contempt, and muſt enter his appearance, yet he ſhall not anſwer upon oath (unleſs, perhaps, for a contempt againſt the peace) and if condemned, he cannot be committed; but a ſequeſtration goes abſolutely, and a corporation muſt anſwer interrogatories, as they anſwer a bill, *viz.* under their common ſeal, and cited the caſes of *Danby* verſus *Lawſon*, *Foſter* verſus *Chriſt's Hoſpital*, *Hill.* 11 *W.* 3. and a caſe where an appearance was entered on a *Diſtringas* in proceſs for want of an anſwer: and a ſequeſtration muſt not go, right or wrong, and a corporation has no other way to defend themſelves againſt the ſequeſtration but this.

It was likewiſe urged, that the very writ of *Diſtringas* is to diſtrain them to appear, and mentions to be, only becauſe they cannot be attached by their perſons; yet now they would not have them appear, and the court is *ad faciend. & recipiend.* and it is abſurd to ſay, that judgment ſhould be given againſt them, without having an anſwer.

On the other ſide, it was ſaid, that the examination for a contempt was for the benefit of the plaintiff, and is to be upon oath; which, if ſuch appearances were allowed to corporations, would be loſt to the plaintiff; that the allowing of ſuch appearances is only in favour of liberty, and not neceſſary to corporations, which cannot * be committed; that againſt a private perſon, the plaintiff ſhall have body, lands, and goods; againſt a corporation, ſequeſtration only; and as the plaintiff has many diſadvantages againſt a corporation, it is reaſonable he ſhould loſe no advantage, and as a common perſon has advantage by appearing,

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ſo has the plaintiff too; for if found in contempt, the next proceſs is a commitment, which elſe would be a proclamation, and then a commiſſion of rebellion, &c.; and the caſes cited are of very little moment, for theſe are of appearances ſaid to be entered, in purſuance of an order, ſo not of courſe; and it does not appear any notice was taken of them in court, but they paſſed *ſub ſilentio*; that they have now a proper time to defend themſelves upon this order, for the ſequeſtration is ordered only *niſi Cauſa*; and they might ſhow for cauſe, that they have paid the money, or performed the decree (if the truth be ſo).

Cur. The defendant's precedents are of no weight, becauſe in all of them, natural perſons, as well as a corporation, were defendants; and the orders being in general terms, may be reaſonably expounded to mean only the firſt, and alſo are all *ex parte*, and abſolute; the party is not to be heard upon any ſubſequent proceſs, why more upon this? The appearance entered of common perſons is in favour of liberty; and the plaintiff has a mutual benefit, which here he cannot have, nor can the defendants loſe their liberty. If you had come and ſhown any irregularity, that might have been cauſe to diſcharge the order; but ſince you do not, let the order be made abſolute.

Then they prayed a further day to be heard, which being granted, they appeared, and made ſeveral objections to the ſervice.

1*ſt*. That there were ſeveral variances between the writ of execution, and the copy of it left with the company; but upon reading of them, the variances appeared not to be material, ſo that objection was over-ruled.

* 2*dly*. For that the writ of execution was not of the whole decree, for the decree *quod computet* was left out, and nothing in, but the decree to pay the money ſtated by the Maſter's report; but that was over-ruled, for that it is not neceſſary the writ of execution ſhould contain any more. 131

3*dly*. It was objected, that the ſervice was upon the governor of the company only, who has no power over the company's caſh,

caſh, and could not pay the money decreed; and it was ſaid, the ſervice ought to have been on the committee; but this was likewiſe over-ruled, for then, if the committee would not meet, or not admit the party in to ſerve them, there could be no ſervice, ſo the order was made abſolute.

Caſe 117.

Barret *verſus* Wells & econt'.

Lands in mortgage, running through three deſcents, and the perſon entitled to redeem, not knowing how much was due for the intereſt, is informed by the heir of the mortgagee, that it was conſiderably leſs than really it was; whereupon he ſettles it upon his marriage, as ſubject only to ſo much; thoſe who derive under this ſettlement, ſhall redeem accordingly, without being obliged to pay the ſum concealed for the fraud.

THE plaintiff's teſtator lent *William Wells* 500*l.* upon mortgage for 1000 years, afterwards the mortgagor deviſed the mortgaged premiſſes to the defendant's father, for ever, and his heirs lawfully begotten, upon condition that he pay all my debts, ſo that none may be a ſufferer by me.

The deviſee lets the intereſt run in arrear, and there being 10*l.* due for intereſt, gave bond for it to the plaintiff, and afterwards there being 100*l.* more due for intereſt, gave bond for it, and likewiſe for 100*l.* more due for intereſt; afterwards the deviſee of the mortgaged premiſſes died.

The defendant, his ſon and heir, being about to marry the daughter of one *Parry*, he went to the plaintiff to enquire what was due on the mortgage; and the plaintiff being deſired not to diſcover the bonds by the defendant's mother, and as it was
132 believed with the * defendant's privity, for fear of ſpoiling the match, ſhe ſaid, there was only 500*l.* due, and that all intereſt was paid, and that upon payment of that ſhe would deliver up the mortgage.

Parry, upon that agrees to marry his daughter to the defendant, and articles were made for ſettling theſe mortgaged premiſſes upon the marriage, and the marriage took effect; and now this bill being brought to foreclоſe, and a croſs bill to redeem,

The defendant inſiſted, he ought to redeem without paying the 200*l.* ſecured by the bonds, for that, as it was ſaid, the taking

taking the bonds was payment of the intereſt, and had turned the debt into another plight, and the mortgage was thereby diſcharged of it; or however, that the plaintiff having informed *Parry*, that there was only 500*l.* due upon the mortgage, and in conſideration of that, he married his daughter, and had the lands ſettled, ſhe ſhall not now be admitted to charge the lands with any more than ſhe then inſiſted to be due; and that the deviſee of the mortgaged premiſſes to the defendant's father, was an entail, and ſo not chargeable with the bonds.

On the other ſide it was ſaid, that the taking the bonds for the intereſt, was only as a farther ſecurity, and did not diſcharge the land; and that the deviſe was a fee-ſimple, and not an entail.

The Maſter of the Rolls was of that opinion, as to the firſt, and ſaid, he inclined to be ſo as to the other; but was of opinion, that the diſcourſe of *Barret* to *Parry* had diſcharged the lands from being liable to more than what ſhe then pretended to be upon them, and ſo decreed a redemption upon payment of the 500*l.* with intereſt from that time, and without coſts.

* Hitchin *verſus* Hitchin.

1 Coke's Inſt. Harg. ed. 36. B. n. 1. 6. 2 Eq. abr. 389, c. 18. S. C. 2 Vern. 365. 581. 1 Vezey, 230. Viner (tit. Deviſe) 366. 9 Mod. 152. 2 Atk. 427. 3 Atk. 8. 437. Brown's Rep. 445.

Deviſe of lands to a man's wife, who was entitled to dower, without ſaying in recompence or ſatisfaction of her dower, held to be a voluntary gift, and no bar of dower.

Samuel Hitchin, the plaintiff's grandfather, made a mortgage for 500 years, which was ſatisfied, and after his death aſſigned to *Sarah* his relict (who was entitled to dower of his eſtate) and died, leaving *Gyles*, the plaintiff's father, his ſon and heir; who being indebted made his will, and thereby deviſed ſeveral lands to his wife *Sylveſtra*, but did not mention it to be in ſatisfaction of her dower, and deviſed the reſidue of his lands to his executors till his debts paid.

Sylveſtra brought her writ of dower, and recovered her dower, and 220*l.* damages; the heir brought his bill to be relieved againſt

the recovery, and ſhe brought her bill to diſcover the profits, and to ſet the term out of the way.

It was urged, that this deviſe muſt be in ſatisfaction of dower, and that the heir might have helped himſelf at law, by ſetting up the mortgage againſt her; and though he had omitted to do that, yet he ought to be helped here, and the rather, becauſe ſhe is a plaintiff likewiſe, and comes for the aid of this court to be helped againſt the mortgage term.

Lord Keeper. *Sylveſtra*'s bill is only againſt the truſtees of the father, to have an account of the real and perſonal eſtate, and to diſcharge the debts; you don't pretend but † a dowreſs is to be relieved againſt a ſatisfied mortgage, ſo ſhe muſt in this caſe: you don't inſiſt upon Lady *Radnor*'s caſe to be againſt it. The heir muſt be relieved againſt the damages till the debts paid; let a Maſter ſee whether ſufficient was raiſed to pay the debts and defalcation out of the recovery; the deviſe is not to be looked upon as any recompence or bar of dower, but a voluntary gift.

† Antè, 65. Poſt, 137. Where equity will remove a ſatisfied mortgage againſt the heir in favour of a dowreſs.

Note; It ſeems the defalcation out of the recovery muſt be in proportion to the profits *Sylveſtra* receives on her being admitted to the term.

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Caſe 119. * Johnſon & Ux' *verſus* Northey & al', and Blake & al' *verſus* Johnſon & Ux' & al'.

2 Chan. Rep. 128. 2 Vern. 409. S. C. 2 Wms. 73. 3 Wms. 111. 371. 1 Vezey, 205. 245.

Decree to ſet aſide a deed in 1638, whereby a deed in 1684 took place, being ſigned and inrolled; and after that the lands in the laſt deed being deviſed to be ſold for payment of debts, and a bill brought to have them ſold accordingly; and to have the benefit of the firſt decree has opened that decree again, and left the defendants at liberty to controvert it over again.

THE Lady *Henrietta Wentworth*, who was daughter and heir of the Lord *Wentworth*, and grand-daughter and heir of the Earl of *Cleveland*, by a deed in 1684, ſettled her eſtate after her own death upon her mother the Lady *Philadelphia Wentworth* and her heirs; but this deed was ſecretly made, and always kept by her: afterwards ſhe made her will, and thereby deviſed the eſtate to her mother for life. Afterwards, when ſhe lay on her death-bed, ſhe called for the deed, which till then ſhe had kept privately by her, and delivered it to her mother, and told her ſhe gave her all ſhe had, and ſoon after died.

After

After her death, the Lady *Lovelace*, who was aunt and heir to Lady *Henrietta*, and alſo heir to both the Earl of *Cleveland* and Lord *Wentworth*, pretended a title to the eſtate, under a ſettlement made in 1638, and otherwiſe.

Thereupon the Lady *Philadelphia* brought a bill againſt her, to diſcover her title, and to have the ſettlement delivered up, as being revoked.

Lady *Lovelace* by her anſwer inſiſted on her title, under the ſaid ſettlement of 1638, and mentioned, that the deed of 84 was unduly obtained, or was a truſt for Lady *Henrietta*, and conſequently for her who was her heir, and that the will was not fairly gained.

In this cauſe witneſſes were examined, and publication paſſed, and the cauſe heard; and a decree by default againſt Lady *Lovelace*, that the ſettlement of 38 ſhould be delivered up, and a perpetual injunction *niſi*, &c. and no cauſe being ſhown, that decree was made abſolute, and ſigned and inrolled; then* Lady *Lovelace* died, leaving the Lady *Johnſon* her grand-daughter and heir. 135

The Lady *Philadelphia* made her will, and thereby deviſed all her eſtate (being the eſtate mentioned to have been before ſettled upon her by her daughter) to the defendant *Northey*, Sir *Robert Howard* and Sir *William Smith* (both ſince dead) and their heirs in truſt, to be ſold for the payment of her debts and legacies, and the ſurplus to be equally divided between them.

The creditors and legatees of Lady *Philadelphia* brought a bill againſt Sir *Henry Johnſon* and his wife, and *Northey* the ſurviving truſtee, in Lady *Philadelphia*'s will, to have the benefit of the decree obtained by her againſt the Lady *Lovelace*, and that the eſtate might be ſold, and their debts and legacies paid.

Sir *Henry Johnſon* and his wife brought their bill upon their title, under the ſettlement in 38, or as heir at law, and to have the deed of 84, and the will of Lady *Henrietta*, ſet aſide.

Publication paſſed in the creditor's cauſe, and then *Northey* put in a plea to the bill of the former decree, and other matters; but that plea, upon the arguing, being ordered to ſtand for an anſwer, the cauſe proceeded, and Sir *Henry Johnſon* examined ſeveral witneſſes as to the deed of 84, and will of Lady *Henrietta*.

The cauſes coming now to be heard, it was inſiſted on by Sir *Henry Johnſon*, that the creditor's bill being to have the benefit of the decree obtained againſt Lady *Lovelace*, he was not bound by that decree, though ſigned and inrolled, but was at liberty to controvert all that matter over again, before the court could decree the execution of that former decree.

My Lord Keeper ſeemed to be of opinion, that the creditors, who are in nature of *Ceſtuique Truſt*, having brought their bill to execute the decree, had opened it, and at laſt, after long debate, a trial was directed, if the deed of 38 were revoked or not.

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Caſe 120.

* Bickham *verſus* Freeman.

Antè, 127.

THE caſe was no more than this: A man deviſes lands to be ſold for payment of his debts, and makes the deviſees executors; and the queſtion was, Whether the debts ſhould be paid in proportion, or according to the courſe of adminiſtration?

My Lord Keeper having taken time to conſider of it till this day, now delivered his judgment, that they muſt be paid in a courſe of adminiſtration, becauſe where the ſame perſon is executor and truſtee, the land when ſold is legal aſſets; otherwiſe, when the *truſtee is executor*, there they ſhall be paid in proportion.

DE

Termino S. Hillarii,

1700.

In Curia Cancellariæ.

Palmes *verſus* Danby. Caſe 121.

IN this caſe one queſtion was, Whether, when an eſtate deſcends to an infant, ſubject to incumbrances, the guardian muſt or may (without the direction of a court of equity) apply the profits to diſcharge the incumbrances, or the intereſt of them? Or whether they ſhould not be accounted perſonal eſtate, and ſo the adminiſtrator of the infant entitled to them, if the infant die during his minority?

A guardian, during the infant's minority, may, without the direction of a court of equity, pay off a mortgage, and the intereſt of any other real incumbrance.

The court held, that the guardian might, without the direction of the court, pay the intereſt of any real incumbrance, and the principal of a mortgage, becauſe that is a direct and immediate charge upon the land; but not any other real incumbrance.

† Another queſtion was, Whether a dowreſs has a right to redeem a mortgage? And my Lord Keeper declared his opinion to be, that ſhe had, paying her proportion of the mortgage

A dowreſs has a right to redeem a mortgage, and hold over till ſatisfied.

† Vide 3 Wms. 717, and the caſes there cited; Ante 65, and references. In the caſe of *Dixon* v. *Saville* (Brown's Rep. 326.) Lord *Loughborough* held the point (that a widow was not dowable of an equity of redemption of a mortgage in fee) ſo much ſettled, as to think it would be wrong to diſcuſs it much.

money, and to hold over for the reſt; and diſtinguiſhed it from Lady *Radnor*'s caſe, for there was a ſatisfied term, and the huſband had a power to bar her, by aſſigning over the term, which he did; but here it is only a mortgage, and againſt the heir.

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Caſe 122. *S.C. 2 Freem. 245.*

* Bromley *verſus* Jeffereys.

† 2 Vern. 416. S. C. Brown's Rep. 158. S. C. cited.

One ſettles his eſtate on truſtees, to be ſold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants, that the huſband ſhall have the eſtate huſband 1500 *l.*

A Caſe was ordered to be made, and was thus; Sir *Rowland Berkley* having a conſiderable real eſtate, and being much indebted, and having no ſon, but ſeveral daughters, made a ſettlement of his eſtate on himſelf for life, then to truſtees and their heirs in truſt, to ſell, and to apply the money for payment of debts, and other purpoſes mentioned in the deed, with a power of revocation.

1500 *l.* cheaper than any other; after he by will revokes the ſettlement, gives the and dies; this legacy held to be in ſatisfaction of the 1500 *l.* ſecured by the ſettlement.

Afterwards he married one of his daughters to the plaintiff *Bromley*, and gave a conſiderable portion with her, and entered into a deed, wherein, after the recital of this ſettlement, he covenanted, that if Mr. *Bromley* ſhould be minded to purchaſe his eſtate of his truſtees, they ſhould ſell it him 1500 *l.* cheaper than any other purchaſer would *bonâ fide* pay for it; provided that if Mrs. *Bromley* his daughter ſhould die without iſſue male, the deed to be void.

Afterwards Sir *Rowland*'s incumbrances being much altered, he makes his will, and therein reciting the ſettlement he had made of his eſtate to be ſold, he does by his will revoke that ſettlement, and deviſes the eſtate to his grandſon *Green* (who was an infant) but deviſes a term of ten years therein to his executors for the payment of his debts and legacies, and gives 1500 *l.* to the plaintiff *Bromley*, 500 *l.* to his wife, and 100 *l.* apiece to their children, and dies.

† In Vernon's Reports the above caſe is differently ſtated, and it is there ſaid, that the court refuſed to decree a ſpecific performance of the covenant, by reaſon of the uncertainty, and its not being mutual: not a word is mentioned reſpecting the point of *ſatisfaction*. *Ibid. 2 Freem.* both points are reported.

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The plaintiff brought this bill to have a ſpecific performance of the covenant, and that he might have the eſtate 1500*l.* cheaper than any one elſe would give for it.

The defendant inſiſted, that the legacies deviſed by the will were in ſatisfaction of the covenant, and had examined witneſſes to prove it; and the plaintiff * examined witneſſes to prove the contrary, for the will mentioned nothing of the matter one way or the other. 139

At the hearing, it was debated, whether any of theſe proofs could be read.

The plaintiff's counſel urged, they might, and that it was but like my † Lord *Cheney*'s caſe, where a man deviſes to his ſon *John*, and has two ſons of that name, witneſſes may be examined to prove which he meant; the defendants would have it preſumed, that this legacy was in ſatisfaction of the covenant; the will ſays no ſuch thing, and we would read proofs againſt this preſumption; and the caſes of ‡ *Forſter* verſus *Munt*, and § *Cordell* verſus *Noden*, *&c.* where it was ſaid, proofs were read to ſuch purpoſe.

† 5 Co. 68.

‡ 2 Vern. 148.
§ 1 Vern. 473.

Lord Keeper. As matters have been ſettled ſince my Lord *Falkland*'s caſe, they cannot be read; for it would be a way to introduce uncertainty, and make the court arbitrary; and that caſe was much ſtronger than this, for there the evidence intended to be made uſe of were letters of the teſtator's own writing, and yet were rejected; and the evidence was not read in my ‖ Lady *Gainſborough*'s caſe to make any conſtruction in law, for the making one executrix is a gift in law of the perſonal eſtate; but the proof read was *to ouſt a conſtruction in equity*, which has been but a late one, neither that, where a particular legacy is given to an executor, he ſhall be ouſted of the reſidue.

‖ 2 Vern. 252.

The Maſter of the Rolls ſaid, he thought it was plain from the will itſelf, that the legacies were intended to be in ſatisfaction of the covenant; for it recites the ſettlement, and revokes it, which is by conſequence a defeating of the 1500*l.* but however, a court of equity is not obliged to decree a ſpecific exe-

cution of all covenants or agreements, be they on never ſo valuable conſiderations, but will conſider all circumſtances, and Sir *Rowland*'s circumſtances, and the condition of his fortune being ſo much altered, and thereupon his purpoſe ſo much changed, that if a ſpecific * execution of this covenant ſhould be decreed, the whole will would be defeated; and therefore he thought that it ought not to be executed in this caſe: and of the ſame opinion was my Lord Keeper, and diſmiſſed the bill.

Caſe 123. Yate *verſus* Fettyplace.

2 Vern. 416. S. C. 2 Eq. abr. 541, c. 10. 659, c. 3. S. C. Antè, 109. Poſt, 195. 240.

A portion of 4000 *l.* deviſed out of lands to a daughter, if ſhe married with the conſent of *A.* and *B.* to be paid at her age of 21, or day of marriage, which ſhould firſt happen; but if ſhe married without ſuch conſent, then ſhe was to have 1000 *l.* only: the daughter dies about ſix years of age. Decreed her portion ſhould ſink for the benefit of the heir, and not be ſubject to diſtribution, tho' ſtrongly inſiſted it was a legacy, and as ſuch recoverable in the Spiritual Court.

SIR *Rowland Lacy*, ſeiſed of the manor of *Pudlicot*, made a mortgage for 1000 years to *Henry Heyling*, for ſecuring 6000 *l.* and intereſt, and afterwards by deed and fine ſettled the ſame to the uſe of himſelf for life, remainder to the defendant *Rowland Lacy* his ſon in tail, with other remainders over, remainder to himſelf in fee; and being ſeiſed of ſeveral other eſtates, moſt of which were reverſions expectant on eſtates for lives, and being greatly indebted to other perſons, and having one daughter, named *Arabella*, made his will in writing, and thereby deviſed the ſaid lands, and all his lands not before ſettled in jointure to dame *Arabella*, his wife, and to Sir *Edmund Fettyplace* and *Charles Fettyplace*, and their heirs upon truſt, that they ſhould by ſale thereof raiſe money to pay his debts, provided, that upon payment of Mr. *Heylin*'s mortgage, the ſaid mortgage ſhould be kept on foot for ſecuring the portion therein after mentioned to *Arabella* his daughter, and his other legacies and debts, if the lands deviſed were not ſufficient to pay the ſame, and thereby deviſed to his ſaid daughter 4000 *l.* for her portion, if ſhe married with the conſent of his wife, and truſtees, to be paid at her age of 21, or day of marriage, which ſhould firſt happen; but if ſhe married without ſuch conſent, then he gave her 1000 *l.* only for a portion, and no more, and made his wife executrix, and died.

Arabella the daughter died ſoon after, being about ſix years of age.

Afterwards

* Afterwards dame *Arabella* the widow, married the plaintiff *Yates*, and took out letters of adminiſtration to *Arabella* her daughter, and made her will, and her huſband Mr. *Yates* executor and deviſee of all, who by virtue thereof, pretended to be entitled to a moiety of the 4000 *l.* deviſed by Sir *Rowland* to *Arabella* the daughter, and alſo to ſo much of the perſonal eſtate of Sir *Rowland*, as was not ſpecifically deviſed away; for that he had made proviſion for payment of his debts by his lands, and had, as was pretended, directed the perſon who drew his will to give his perſonal eſtate to his wife; but that he had omitted to do, becauſe, he thought, that the making of her ſole executrix was a gift of it in law, and had examined one *Brooks* an attorney, who drew the will, to that purpoſe. 143

Mr. *Yates* brought his bill to have an account of Sir *Rowland*'s perſonal eſtate; and that he might have the ſurplus of it, and for a moiety of *Arabella*'s 4000 *l.*

Rowland Lacy, the infant heir, brought a croſs bill againſt him, for an account of the real and perſonal eſtate of his father (Dame *Arabella* having in her life-time been the only acting truſtee.)

The creditors brought their bill to have the truſt performed, and their debts paid.

An account being directed to be taken, and the Maſter having made his report on hearing theſe cauſes before my Lord *Somers*, aſſiſted by the Maſter of the Rolls; as to the firſt demand of Mr. *Yates*'s touching the ſurplus of Sir *Rowland*'s perſonal eſtate, Mr. *Brooks*'s depoſition (which was admitted to be read) was inſiſted on, and † Lady *Gainſborough*'s caſe relied on, as a caſe in point; but as to that, the bill was diſmiſſed, and the court took farther time to conſider of his demand of the moiety of *Arabella*'s portion; but before any judgment was given therein, the ſeal was given to Sir *Nathan Wright*, and then Mr. *Yates* petitioned to have his cauſe reheard, † Antè, 139.

* The cauſe coming now to be reheard before my Lord Keeper, aſſiſted by the Maſter of the Rolls, as to the demand of the perſonal eſtate, the former order was confirmed, and the bill diſmiſſed. 142

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As to the other demand of the moiety of *Arabella*'s portion, it was inſiſted, that it was a legacy to her, and might have been ſued for in the Spiritual Court (though it were charged on land) and no court would have prohibited them, and by their law it would have been recovered, though ſhe died before the time of payment; and where this court holds plea of matters of eccleſiaſtical conuſance, they ought to judge according to the civil law; that this caſe differs from all the caſes cited on the other ſide, touching the ſinking of portions in lands, they being all in caſes of mere truſts, wherein the Chancery alone had the entire juriſdiction, and where no ſuit lay in the eccleſiaſtical court for it, and might have given ſentence for the appellant, according to the civil law.

On the other ſide, it was ſaid, that the precedents were the ſame in effect with this, and particularly the caſe of † *Pawlet* and *Pawlet*, and no real difference between them; and of that opinion was my Lord Keeper and the Maſter of the Rolls, and therefore diſmiſſed the bill, as to this demand likewiſe, and this diſmiſſion was affirmed in the Houſe of Lords.

† 1 Vern. 321.

Caſe 124. Blake *verſus* Johnſon.

2 Eq. abr. 86, c. 5. 260, c. 1. 371, c. 11. 479, c. 6. S.C.

One being in an undue manner drawn in to execute a conveyance of his eſtate, after makes his will, and thereby deviſes all his land to be ſold for payment of his debts; his creditors may ſet aſide the conveyance, having a right, in nature of an equity of redemption, as the teſtator himſelf had, though urged, that it was but in nature of a choſe in action, and not aſſignable. *ſee Windhouſe v. Brayfield 2. Vern. 307. 2d Dec. 1st Mem. Eq. Cas. abr. 175.*

SOME deeds having been unduly obtained from the Lord *Lovelace* ſome few months before his death, which he being ſenſible of, made his will, and deviſed all his eſtate in the firſt place for payment of his debts, and the ſurplus to other perſons.

143 * The creditors brought this bill to be relieved againſt theſe deeds, and to have the lands ſubjected to the payment of their debts.

It was objected, that if theſe deeds had been unduly obtained (which was denied) yet this deviſe was but in the nature of a right of action, which was not aſſignable, and therefore the creditors could have no benefit of it.

But it was held by my Lord Keeper and the Maſter of the Rolls, that this is but in nature of an equity of redemption, which

which may be aſſigned; as he himſelf might have come here to be relieved againſt theſe deeds, ſo may his deviſees.

Juxon *verſus* Brian. Caſe 125.

MY Lord Keeper declared his opinion in this caſe without debate, that where lands are deviſed to truſtees to raiſe money for ſeveral purpoſes, and they raiſe the money out of the profits, the land is thereby diſcharged, and the perſons concerned muſt reſort to the truſtees.

Tidcombe *verſus* Boddington. Caſe 126.

PLAINTIFF being colonel of a regiment of foot in his majeſty's ſervice, entered into an agreement with one *Moyer*, (who, it ſeems, was a partner with the defendant *Boddington*) for cloathing his regiment for the year 1696; the contract was in writing, and was made in the name of one *Chambers*, and was, that *Moyer* ſhould furniſh the regiment with ſuch and ſuch particular cloaths, at ſuch particular prices.

If the colonel of the army makes an aſſignment of the off-reckoning of any year, for the cloathing of that year, and has before anticipated theſe off-reckonings of that year, for the cloathing of the foregoing year; he ſhall be anſwerable in his own perſon, if the agreement be ſo worded as to charge him; and that the off-reckonings of the following year are ſo far diverted, by altering the eſtabliſhment of the regiment, as not to be applicable to make good theſe payments.

At the making of the bargain, it was agreed between *Moyer* and the plaintiff, that the plaintiff was not to * be liable in his own perſon or eſtate for the money, but that *Moyer* was to be paid out of the off-reckonings, and he was intruſted by the plaintiff to have the contract drawn accordingly. 144

When the contract was preſented to the plaintiff, by him to be executed, he deſired time to adviſe with his counſel, whether it were ſo drawn, as that he could not be charged in his own perſon or eſtate; and *Moyer* aſſuring him it was ſo drawn, he thereupon executed it, and the ſame time delivered *Moyer* an aſſignment for his whole money out of the off-reckonings upon the paymaſter; and by virtue of that aſſignment about 300 *l.* was received.

By the courſe of payment in the army, when an aſſignment is made of the off-reckonings for payment of the cloathing of any year,

year, if the off-reckonings of that year are not ſufficient to complete the payment, he that has ſuch aſſignment, is to receive out of the off-reckonings of the following year, till his payment is complete, and the regiment being in arrear for their cloathing, the aſſignment that was to them that cloathed the army in 1695, was not paid by the off-reckonings of that year, but took up good part of the off-reckonings of the year 1696.

In the year 1697, an act of parliament was made, which appropriated the off-reckonings of the year 1697 to the payment of the cloathing for that year only, and no other; ſo that *Boddington* was thereby prevented from having any ſatisfaction out of the off-reckonings of that year, as elſe by the courſe of payment in the army he would have had; and this regiment happening, juſt at that time, to be removed into *Ireland*, and put upon a new eſtabliſhment, *Boddington* was thereby prevented from having any further benefit of his aſſignment upon the off-reckonings, and was like to loſe his money.

Thereupon conſulting with his lawyers what to do, he was
345 adviſed, that as the contract was, he might * charge the colonel in his own right; whereupon he brought his action at law againſt him, in the name of the truſtee and *Tidcombe*; having unadviſedly pleaded, that the cloaths were not delivered according to the contract, the plaintiff at law recovered the whole ſum mentioned in the contract.

Whereupon Colonel *Tidcombe* brought this bill to be relieved againſt the recovery at law.

Both *Boddington* and *Moyer* did by their anſwer confeſs, that they were to expect their payment out of the off-reckonings, and that the colonel was not to be charged himſelf in his own right, unleſs he did ſome way divert them, or prevent them from having the benefit of them; and that in caſe the off-reckonings of any year did not ſuffice to pay the cloathing of that year, he who had an aſſignment on the off-reckonings was to receive out of the off-reckonings of the ſubſequent year, till his payment was completed; but inſiſted, that *Tidcombe* had diverted the off-reckonings of 1696, *viz.* by the ſaid aſſignment for the cloathing of 95; and that at the time of the contract, they knew not

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that the regiment was ſo indebted, but the contrary to that was proved, and made *Moyer* on that account inſiſt upon having higher prices.

At the hearing, it was urged for the plaintiff, that if this contract was ſo drawn, as to charge the colonel in his perſon, it was a fraud in *Moyer* (who was intruſted with the drawing of it) to have it ſo drawn, and he, upon the executing of it, affirmed it was ſo drawn, as not to charge the colonel in perſon, and thereby prevailed on him to execute it, without adviſing with counſel, as elſe he would have done; that *Moyer* and *Boddington* both knew of the aſſignment for the cloathing of the year 95; and it was confeſſed by them both that the colonel was not to be charged in perſon, if he did not prevent them of the benefit of the off-reckonings, and that he had done no other act whatſoever.

For the defendants it was ſaid, they were honeſt creditors, and had recovered at law, and that a court * of equity ought not to hinder them from getting their money; that no parol proof of the plaintiff's ought to be admitted againſt the agreement in writing; that the aſſignment to the former clothier was an anticipation made by the plaintiff, and that he ought to make good the money. 146

Lord Keeper. *Boddington* does admit by his anſwer the courſe of payment in the army, but ſays, where payment of the off-reckonings is prevented by the colonel, or the party anyways hindered from receiving the ſame, the colonel is to be anſwerable; and by the eſtabliſhment of the army, the off-reckonings of every year are to anſwer and pay the cloathing of that particular year; and the off-reckoning of 96 was anticipated by the colonel for the cloathing of the year 95, and ſurely one witneſs to a parol agreement is not ſufficient to ſet aſide a contract in writing, and therefore the plaintiff cannot be relieved for more than what is paid, which muſt be diſcounted out of the money recovered.

Afterwards the plaintiff appealed to the Houſe of Lords, and the cauſe was heard by them, but they delayed giving judgment,

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on purpoſe that the parties may agree the matter, which they did; then the decree was confirmed by conſent, though the Lords ſeemed diſpoſed to reverſe it.

Caſe 127.

Luke *verſus* Bridges and Chriſty.

2 Eq. abr. 708, c. 3. S. C. 3 Wms. 277. Vide infrà, 149.

Scrivener or attorney puts out his client's money on a ſecurity, which he might on the leaſt inquiry have found to be defective, or even where he had notice of ejectment delivered on a prior mortgage; yet could not be charged in equity to anſwer the money.

MR. *Thomas Chriſty* (to whom the defendant *Chriſty* and others were executors) had been a conſiderable practiſing attorney, and was brother-in-law to the plaintiff *Luke*, who having 1000*l.* out at intereſt, and the ſame being to be paid in, deſired it might be paid to her brother-in-law Mr. *Chriſty*, and that he would get her a ſecurity for it: accordingly the money was paid in to him, and he, without any further directions from the plaintiff, or acquainting her at all of the matter, * in *March* 1692, lent it out on a ſecurity of a mortgage, made by Sir *Charles Bickerſtaff* to one Mr. *Robert Marſham*, for ſecuring 250*l.* which afterwards was increaſed to 1100*l.* and was by him aſſigned to the defendant *Bridges* for ſecuring that ſum; and the aſſignment was taken in the name of the plaintiff, and ſhe had ſome of the title deeds delivered to her, and received 68*l.* of the intereſt from Sir *Charles Bickerſtaff*; but it fell out that the ſecurity was præ-incumbered, and would not anſwer the money.

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The plaintiff brought this bill to have the money made good to her, either by the executors of her brother-in-law, who had put out the money, or by Mr. *Bridges*, who had the ſecurity before upon a re-aſſignment, and had long before brought a bill againſt Sir *Charles Bickerſtaff* to have the redemption foreclоſed, and a decree had been obtained by ſale of the eſtate, and Mr. *Hungerford* had been allowed the beſt purchaſer for 600*l.*

Thereupon Mr. *Bridges* arreſted Sir *Charles* upon his bond, and he was in priſon in the *Fleet*; and afterwards he, to procure his enlargement, paid Mr. *Bridges* 600*l.* and there remained due to Mr. *Bridges* at the time of his aſſignment only 643*l.* for principal, intereſt, and coſts; and yet the aſſignment is made in conſideration of 1000*l.* mentioned to be paid to him, and he accordingly had a bill for 1000*l.* upon Sir *John Johnſon*, the goldſmith, delivered to him, which was a fraud in him, and he concealed

cealed all theſe matters from Mr. *Chriſty*, and aſſigned this as a good ſecurity.

It was urged, that this was a fraud, and the reaſons inſiſted upon and proved by the plaintiff for relief againſt the defendant *Bridges* were, that he, after the ſecurity aſſigned to him, had joined with the mortgagor in ſelling part of the mortgaged premiſſes, which (as was alledged) was the beſt part of the ſecurity; and at the time when he aſſigned the ſecurity to the plaintiff, knew it to be bad, and therefore he ought to take back the ſecurity, and anſwer the money.

* As againſt Mr. *Chriſty* it was alledged, that he by receiving the plaintiff's 1000 *l.* became debtor to her for ſo much, and his putting of it out on this ſecurity, without ſo much as acquainting her or her friends, or adviſing with her counſel, could not diſcharge him of the demand ſhe had againſt him for the ſaid 1000 *l.*; that if he were not guilty of a fraud in that matter, yet he was guilty of a groſs neglect, not to inquire into the circumſtances of Sir *Charles*, who then owed 10,000 *l.* upon ſtatutes, judgments, *&c.* which might have been found out if inquired after; that he himſelf was ſo ſatisfied of his faultineſs in the caſe, that he had declared he thought himſelf obliged in conſcience to make her ſatisfaction, and that he would do ſo (as was fully proved in the cauſe) and *volenti non fit injuria*, and he had left a great eſtate, and no debts or children, and had by his will only left the plaintiff an annuity of 20 *l.* *per ann.* to commence after the death of his wife; 148

It was anſwered on behalf of Mr. *Bridges*, that as for the aſſignment being made in conſideration of 1000 *l.* paid to him, whereas ſo much was not due to him, it was ſo done by the deſire of Sir *Charles Bickerſtaff*; and though the bill for the whole 1000 *l.* was made payable to him, yet he had only received ſo much as was due to him, and Sir *Charles* had the reſt; that he having been deceived in the mortgage, and taken an ill ſecurity, might juſtly get rid of it as he could, and had obligation to diſcover the badneſs of the ſecurity, which would have prevented his ever parting with it; therefore he having been guilty of no

fraud, there was no reaſon to charge him with any part of the money, or to force him to take back the ſecurity.

It was ſaid for Mr. *Chriſty*, that there was no fraud in him; that he had received and put out the money at the plaintiff's deſire; that he had tranſacted the ſecurity merely out of friendſhip to her, and without any reward from any body, and ought not to be anſwerable for the misfortune; and that to charge * him would 149 be to deſtroy all commerce in relation to ſecurities, for no one would venture to put another's money upon a ſecurity, if he were obliged to warrant and make it good, in caſe a loſs ſhould happen, without any fraud in him; that though the plaintiff had not been acquainted with this ſecurity beforehand, yet ſhe had given him directions in general to put out the money, and approved it after by taking the deeds, and receiving the intereſt, and had petitioned the Houſe of Commons againſt Mr. *Philip Bickerſtaff*, who was a member of that houſe, and bound with his brother Sir *Charles* in the bond for performance of covenants; that what he ſaid of thinking himſelf bound in conſcience to make her ſatisfaction, were only expreſſions of great concern for the plaintiff's misfortune, but could not in any court of law or equity oblige him to make her any reparation, who had done her no wrong; nor did ſhe ſet up any ſuch pretence during his lifetime, though he lived five years after the money lent; and he had by his will given 20*l. per ann.* after the death of his wife, and ſeveral other conſiderable legacies to the family, which he had no obligation to have done.

My Lord Keeper ſaid, he did not think that either Mr. *Chriſty* or Mr. *Bridges* had done altogether what in natural juſtice they ought to have done, yet that there was no ſufficient foundation to charge either of them in equity. He cited the caſe of Sir *John Foach* the ſcrivener, upon the mortgage of Mr. *Jervis*, where, though Sir *John* had notice of declarations in ejectment, delivered on a prior mortgage, before he lent his client's money, yet could not be charged to make good to his client the money he afterwards lent upon it: ſo he diſmiſſed the bill without coſts; and this decree was afterwards affirmed in the Houſe of Lords.

1 Vezey, 57. the party anſwerable having notice of an incumbrance.

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* Clark *verſus* Ward.

Caſe 128.

2 Eq. Caſes abr. 474, c. 1. S. C.

THE defendant *Ward* had inveigled his wife to levy a fine of her land to him when ſhe lay on her death-bed, pretending that he was thereby only to have it for his life; and a *Dedimus* was ſent into the country to take the fine, and the *Caption* was taken about 100 miles from *London*, the very day ſhe died; and therefore, becauſe the fine could not have ſtood, the party being dead before the king's ſilver was paid, the writ of covenant was raſed in the *Teſte*, and made to bear date 10 days backward; and all other parts of the fine were raſed likewiſe, and made to correſpond with it; and the king's ſilver was paid, and ſo all appeared upon the record to have been done before the death of the woman.

Fine fraudulently obtained, and raſures in ſeveral parts of it to make it correſpond throughout, a crime in the officers who did it, but no cauſe for ſetting aſide the fine, or for a reconveyance of the eſtate in equity, and the examination proper only in the court where the fine was levied.

This bill was brought by her heir at law, to ſet aſide this fine as obtained by fraud, or to have a reconveyance of the land; and it was admitted by the defendant's counſel, that a fine obtained by fraud, might be ſet aſide as well as any other conveyance; but to bring ſuch matter to be examined here for irregularity, or on pretence of raſures or alterations, they ſaid was without precedent. If a judgment had been irregularly entered or obtained at law, that muſt be ſet aſide in the court where it was obtained, or not at all, and cannot be done by examination here, being wholly foreign from the juriſdiction of this court, and of dangerous conſequence: and if ſuch examination could have been proper at law (which it could not) it muſt have been only againſt the officer of the court, and that ought to have been by petition; and if the matter were proper for relief, it ought to have been made out by proofs before the hearing, and cannot be done by farther proofs after publication.

* On the other ſide it was ſaid, This examination into the parts of the fine, is only to ſhew the fraud in obtaining it, and can be only obtained here, for it is concerning parts of the fine which are only here in this court, and may be made out after publication, for it is only inſpecting the force of the records; and though the fine ſtand good, yet the uſes may be ſet aſide; as if truſtees 151

levy a fine to one without conſideration, the court will not ſet aſide the fine, but order a reconveyance of the land.

Lord Keeper. There is a great deal of difference between the irregularity of paſſing the fine, and the undue and fraudulent manner of obtaining it; for which he cited *Greenwood*'s caſe, and *Hungate*'s caſe, 5 *Co.* 2 *Vent.* 30. and ſaid, if a fraudulent obtaining a fine could have been relieved againſt here, it would have been attempted in ſome of thoſe caſes; and if it ſhould be examinable here, it would be a great weakening of fines, and can only be examined here to puniſh the party that did it *criminaliter*; in *Gellibrand*'s caſe, where one was perſonated, yet the fine was not ſet aſide, but a reconveyance ordered; afterwards the bill was diſmiſſed †.

Caſe 129.

Wray *verſus* Williams.

2 Vern. 378. S. C. 1 Wms. 137. S. C. more fully ſtated. Antè, 65. and ref. Antè, 137. and (N.)

A guardian ſuffered a dowreſs to recover at law, by not ſetting up a term, which was created for protecting a purchaſer, and the infant was relieved.

A Term was raiſed in *Black-Acre* in truſt, to indemnify Mr. *Buckley* againſt incumbrances that might affect *White-Acre*, which he had purchaſed; the defendant *Williams* brought a writ of dower of *Black-Acre* againſt the plaintiff, who was an infant, and his guardian had let her take judgment at law, without ſetting up the term, or taking any notice of it; ſo this bill was brought by the infant heir to be relieved againſt that judgment.

It was ſaid by the court, that this caſe is the ſame with my Lady *Radnor*'s, and if ſhe could not be relieved as plaintiff, it muſt be for want of equity, and therefore * the plaintiff muſt be relieved againſt her when ſhe is defendant. No difference in reaſon betwixt a tenant by the courteſy, and a tenant in dower; although one has been adjudged one way, and the other another. Lady *Radnor*'s caſe having been affirmed in the Houſe of Peers, the authority is ſo great, that the court cannot get

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† From this decree there was an appeal to the Houſe of Lords, which was diſmiſſed, and the decree affirmed. 1 Brown's Parl. Caſes, 137.

over

over it. It has been always admitted, that an unſatisfied mortgage ſhall not ſtand in a dowreſs's way, but that ſhe may redeem; this is not a mortgage, but a term to indemnify a purchaſer, and it muſt continue ſo; and ſubject to that, it muſt be in truſt for the heir †.

† Upon a rehearing, Lord Keeper *Wright* affirmed his former decree: Lady *Williams* afterwards brought her bill of review; and upon ſolemn argument before Lord Keeper *Harcourt*, he reverſed the decree, and ordered, that the plaintiff, Lady *W.* having recovered dower at law, this truſt term, which Sir *B. Wray* had ſet up, ſhould not ſtand in her way in equity. Vide 1 Wms. 139.

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Termino Paſchæ,

1701.

In Curia Cancellariæ.

Caſe 130. **Brown *verſus* Bradſhaw & al'.**

2 Vern. 426. S. C. Vin. Abr. tit. Prerogative, 529. Antè, 47, 48.

An Extent in Aid is taken out by the king's receiver againſt his own debtor, againſt whom a commiſſion of bankruptcy was before awarded; and the aſſignees under the commiſſion brought their bill in Chancery to ſet aſide the Extent in Aid; and after 15 years pendency of the ſuit, at the hearing, the bill was diſmiſſed, for that the Court of Chancery had no juriſdiction in caſes of this nature, which were only proper for the Exchequer, being the court of the king's revenue, and from which the Extent in Aid iſſued, and therefore only examinable there; and if ſet aſide here, yet the Exchequer might carry on the proceſs, till the debt cleared, according to the courſe of the court.

MR. *Kingdom* (amongſt other things) was farmer of the hearth-money under the crown, and his accounts not liquidated in the Exchequer; and there were accounts depending between Mr. *Kingdom* and Mr. *Hind* a goldſmith, who became a bankrupt; and after his bankruptcy, but before any aſſignment made by the commiſſioners, an Extent in Aid was taken out in the name of *Kingdom* againſt *Hind*, and all his eſtate, both real and perſonal, was ſeized by virtue thereof.

The plaintiffs, who were aſſignees of *Hind*'s bankruptcy, brought this bill to be relieved againſt the ſaid Extent.

Anſwers were put in, and many proceedings had in the cauſe, ſo that it had depended 14 or 15 years; and now at the hearing, the defendants inſiſted, that this court had no juriſdiction in this cauſe, for it being a matter relating to the king's revenue, ought to be controverted in the Court of Exchequer
154 (where there is * a court of equity for ſuch matters) and not in this court.

For

For the plaintiffs it was inſiſted, that this was really the cauſe of the defendants, and not the king's; that the farmers of the hearth-money are not in truth indebted to the king, at leaſt there is no liquidated debt, and that in reality the farmers of the hearth-money are indebted to *Hind*, inſtead of his being indebted to them; that there are many precedents where Extents of this kind have been controverted in this court, ‖ as *Capel* verſus *Brewer*, in my Lord *Jeffery*'s time; † *Cholmley* verſus *Sturt*, in the time of the late Commiſſioners, where the defendant, who was a creditor by ſimple contract of a perſon deceaſed, had preferred himſelf by ſuch Extent before other creditors of a higher nature, and he was decreed in this court to refund; that this is in nature of a commiſſion of bankruptcy, which iſſues out of this court, and therefore will give this court juriſdiction, though it had it not otherwiſe; and if the Court of Exchequer has a juriſdiction in ſuch caſes, ſure this court has at leaſt a concurrent juriſdiction with it; and if it had not a juriſdiction, the defendant ought to have taken advantage of it by exception or demurrer, but ought not to be permitted to do it now after fifteen years pendency of the cauſe.

‖ 2 Vern. 469. S. C.
† 2 Vern. 426. S. C. cited. Antè, 47, 48. S. P. *contrà.*

The Attorney General ſaid, there is in this cauſe an original Extent for the king, as well as this Extent in Aid; and till it appears the king's debt is ſatisfied, according to the courſe of the Exchequer, this court will not ſet aſide the ſaid Extents: and it is not material that the king's account is not liquidated, for till this, they are debtors for the whole, and the irregularity of the Extent ought to be controverted only in the Exchequer, from whence the Extents iſſue, and not here; and the Court of Exchequer is as ample a court of equity as this; and the king muſt proceed in the Court of Exchequer.

* If this court ſhould hold plea in ſuch caſes, the conſequence will be, that the account of all the king's debts may be drawn hither, for nothing can be done in this matter till the account be taken; and if that were taken here, yet the king will not be concluded by it in the Exchequer, for till the account be diſcharged there, he may take out proceſs there; and it is the plaintiff's own fault that he has travelled ſo long out of the way, 155

for he was told of it at firſt; the commiſſioners have no other right than the bankrupt himſelf had; and therefore if he could not have come hither, no more can they; and the Court of Exchequer was firſt poſſeſſed of the cauſe by the Extents, and they have as ſupreme juriſdiction in the king's cauſes, and do often grant prerogative orders to remove cauſes out of other courts, where the conſequence would be to have their proceedings examined elſewhere.

As to the caſe of *Capel* verſus *Brewer*, the defendant there confeſſed there was no debt, and that he was able to pay the king's debt without aid; and there the bill was only againſt the party that had preferred himſelf, and his ſimple contract debt, and the decree was only againſt him to refund upon the fraud, and did not meddle with the Extent; but here the bill is to ſet aſide the Extent, and there the king could have had no benefit of the Extent, though they were Extents in Aid.

The caſe of *Cholmley* verſus *Sturt* is the ſame with the other caſe, and differs from the preſent caſe as the former did; and it is found by the inquiſition, that *Hind* was indebted, and they ought to have traverſed the inquiſition if they would have controverted that matter.

My Lord Keeper, after ſome time taken to conſider of it, diſmiſſed the bill; the ſuggeſtions whereof he ſaid were only that *Hind* was not indebted to the king, or to the farmers, nor they to the king, and that theſe Extents are only a fraud to protect the bankrupt; that theſe matters were not proper before him, nor in his power to examine into, being found and of re-
156 cord in * the Exchequer; that it would be to the prejudice of the king, for if theſe Extents ſhould be ſet aſide, the king would be deprived of the money he is in poſſeſſion of by them; that as to any pretence of irregularity, that was examinable in the Exchequer only; that both the precedents cited, are ſince this bill was depending; that in the caſe of Sir *Hugh Capel* verſus *Brewer*, the defendant confeſſed that he had ſufficient to pay the king, and that his debt was not in danger, and that he took out the Extent himſelf. *Cholmley* verſus *Sturt* was a fraud,

and an Extent in Aid was never made uſe of ſo far before. The juſtice of the nation is diſtributed into particular courts, which I cannot confound.

City of London *verſus* Richmond, Aderſey, & al'. Caſe 131.

2 Vern. 421. S. C. 5 Coke, 16. a. 2 Eq. Caſes, 86, c. 6. S. C. Viner, vol. 6. 250. pl. 15. 1 Vezey, 56.

ADERSEY for a certain ſum of money had articled with the city to lay a pipe, which ſhould not convey leſs than 19 tuns of water an hour to *Stocks Market* and *Cheapſide*.

Aſſignee of a perſonal contract for a liberty of bringing water to the city of *London*, chargeable in equity with the covenants in the original leaſe or contract, as an equitable aſſignee upon an equitable privity of eſtate, like the aſſignee of a bond.

The defendants and one *Houghton*, who was no party to the bill, and others, who were not brought to hearing, being acquainted with thoſe articles between *Aderſey* and the city, had determined with themſelves to take a leaſe of thoſe waters from the city, and before the pipes were laid, employed *Houghton* to treat with the city, and take a leaſe of them to himſelf; but they had agreed among themſelves, that there ſhould be 900 ſhares in that leaſe, and that *Houghton* ſhould have 300 ſhares to himſelf, and the other 600 ſhares were to be to the other parties in other proportions.

Houghton accordingly treated with the city in his own name, and took a leaſe of theſe waters from them for 51 years, at 2600*l.* fine, and 700*l. per ann.* rent,* during the term; and *Houghton* covenants for himſelf and his aſſigns to pay the rent, and to do ſeveral other matters. 157

By indenture of the ſame date with the leaſe, and made between *Houghton* of the one part, and four others (two of which were only brought to hearing) of the other part, *Houghton* aſſigns this leaſe to thoſe four perſons in truſt for himſelf, as to 300 ſhares; and for their own benefit as to 600 ſhares, as had been agreed between them before taking the leaſe.

Aderſey lays the pipe, but inſtead of carrying 19 tuns *per* hour, it did not carry above 5 tuns *per* hour, and the leaſe proved a very hard bargain, and *Houghton* fails.

The city brought this bill againſt the aſſignees of the leaſe to pay the rent in arrear, and the growing rent, and to perform the other covenants in the leaſe; and as againſt *Aderſey* it prayed, that if *Houghton* had not fully performed his articles with the city, he might do it, that the other defendants might have the benefit of them,

It was objected, that this being ſuch an unreaſonable and loſing bargain, ought not to be decreed in a court of equity, nor ought the parties to be charged further than they might at law, or any more than an aſſignee of all the term, except a week, *&c.* (who therefore would not be liable at law to the covenants in the leaſe) ſhould be obliged in this court to perform them.

It was further urged, that there was neither privity of contract nor eſtate between the plaintiffs and defendants, and the leaſe is only a perſonal contract for a liberty of bringing water, which the city enjoys under an act of parliament; and if the defendants are chargeable at all here, yet they can be charged only to account for the profits, and not to anſwer the whole rent.

My Lord Keeper ſaid, here is an equal privity of eſtate, as in the caſe of an aſſignee of a bond; and as to its being a bad
*158 bargain, he thought that not material, * for there is the ſame reaſon that a bad bargain, if fair, and without fraud, ſhould be decreed, as if it had been a good one; and it is plain here was no fraud nor ſurprize in this caſe, for the indenture between *Houghton* and his aſſignees bears date the ſame day with the leaſe, and recites it, and what the fine and rent was, and then agrees to divide it into 900 ſhares, *&c.* They ſhall be decreed to pay the rent for the time paſt; but I can make no decree that they ſhall continue the payment of it during the term, for they are chargeable no longer than the privity of eſtate continues; and if they can aſſign it over, that ground of the charge is gone †.

† There was an appeal to the Houſe of Lords from this decree, but it was diſmiſſed, and the decree affirmed. 1 Brown's Caſes in Parliament, 30.

Blake

Blake *verſus* Sir Edward Hungerford.

Caſe 132.

2 Eq. abr. 256. c. 2. S. C.

SIR *Edward Hungerford*, ſeiſed in right of his wife of the manor of *D.* procures her to join with him in a fine by way of mortgage in fee for ſecuring 15000*l.* and the equity of redemption thereof upon payment of the money is limited to Sir *Edward* for life, without impeachment of waſte; remainder to the wife, and her heirs and aſſigns.

A. ſeiſed in fee in right of his wife, joins in a fine, and declares the uſes to *B.* by way of mortgage, for ſecuring 15,000*l.* and ſubject thereto to the uſe of *A.* for life; remainder to the wife in fee: then *A.* acknowledges a ſtatute to *C.* for 500*l.*; then the wife dies, and *A.* ſells his eſtate for life for 3000*l.* to *D.* the ſon and heir at law of the wife, who had no notice of the ſtatute; and the mortgage is aſſigned to a third perſon, who paid off the 15000*l.* and advanced the 3000*l.*; then *D.* acknowledges a ſtatute to *E.* who had no notice of *C.*'s ſtatute, makes his will, and deviſes theſe lands to *A.* and dies: As to the 3000*l.* held clearly that ſhould be preferred to *C.*'s ſtatute; held alſo that *E.*'s ſtatute ſhould be preferred to *C.*'s, becauſe the mortgagee was but in nature of truſtee for the ſon.

Sir *Edward* afterwards acknowledges a ſtatute of 500*l.* to *George Arnold*, to whom Sir *Jeremy Sambrook* is adminiſtrator; then the wife dies, and *Anthony Hungerford* was her ſon and heir. Sir *Edward Hungerford* contracted with *Anthony* his ſon, who had no notice of the ſtatute, to ſell him his eſtate for life in the manor for 3000*l.* and accordingly *Anthony* procures 3000*l.* more to be taken up upon the mortgage, and the mortgage to be transferred to the new mortgagee, who paid off the old ones, and furniſhed the 3000*l.* to Sir *Edward Hungerford*, * and the equity of redemption is limited to *Anthony*, and he covenants to pay the money; and the mortgagee's covenant on payment of the money to aſſign to him, or as he ſhall direct.

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Then *Anthony* acknowledges a ſtatute to one *Melliſh* (who had no notice of the 500*l.* ſtatute) and after makes his will, and deviſes legacies to the plaintiffs, and chargeth them on the ſaid manor, and deviſeth the manor itſelf to Sir *Edward Hungerford* and his heirs; and the great queſtion was, Whether *Sambrook*, who had the intereſt of the ſtatute acknowledged by Sir *Edward*, whilſt he was tenant for life, or *Melliſh*, who was *Conuzee* of *Anthony*, after his purchaſe of Sir *Edward*'s eſtate for life, ſhould be preferred in payment?

The Maſter of the Rolls decreed, that Sir *Jeremy Sambrook*'s ſtatute muſt come in after the creditors and legatees of Sir *Anthony*

thony Hungerford; and that *Melliſh* muſt come in immediately after *Anthony*'s legacies, by virtue of *Melliſh*'s ſtatute, *Melliſh* having joined in the declaration of truſt; and this decree was affirmed by my Lord Keeper, with the aſſiſtance of Mr. Juſtice *Blencow* and Lord Chief Juſtice *Trevor*.

The reaſons urged for it were, that though neither had the legal eſtate, and that between two equities *qui prior eſt tempore potior eſt jure*, yet that muſt be underſtood of bare equities, but in this caſe *Anthony Hungerford* had more than a bare equity; that the caſe of *Smith* and *Chriſt's Hoſpital* did not come up to this caſe, for there was a term ſtanding out, to which neither party had a right; but by *Anthony*'s purchaſe the whole intereſt is united in him, and they who had the legal intereſt covenanted to aſſign to him, and are but his truſtees after payment of the mortgage money, and it differs little from the common caſe, where a third mortgagee buys in the firſt mortgage in truſt for himſelf, and *Anthony* may make uſe of his truſtee's name at law, either to defend or recover, and may have an action at law againſt them to aſſign.

160 * That though Sir *Edward*'s equity for life would have entitled him, on payment of a third part, to redeem, and the 500*l.* ſtatute was a charge upon that equity, yet that is liable to be defeated by a ſubſequent incumbrancer without notice; but ſuch purchaſer muſt not be a purchaſer of a bare equity only, for then the firſt will prevail; but *Anthony* is a purchaſer of Sir *Edward*'s equity, and the legal eſtate together, and will have the protection of the legal eſtate.

His deed of purchaſe takes notice of the caſe, and that the mortgage is aſſigned at his inſtance and by his procurement, and ſo he purchaſes the benefit of the legal eſtate, together with the equity.

If a third mortgagee takes only an agreement of the firſt mortgagee to convey to him, the ſecond cannot in ſuch caſe compel him to aſſign to him, becauſe ſuch agreement was no more than what they might have done without any agreement; and in this caſe *Anthony* is not entitled upon the old equity of Sir

Sir *Edward*, but on the new equity raiſed on the new mortgage; and he is an abſolute purchaſer of the eſtate ſubject to the mortgage, and muſt have the protection of it; and to decree a conveyance to Sir *Jeremy Sambrook*, would be to decree a breach of a fair and lawful covenant and agreement.

Jory *verſus* Cox. Caſe 133.

Antè, 171. S. C. but not S. P. 1 Wms. 652. S. P. 3 Atk. 519.

A Mortgagee lends money at 6 *l. per cent.* but agrees in the deed, that if the money were paid within three months after it became due, that he will accept of 5 *l. per cent.*

A mortgagee lends money at 6 *l. per cent.* and in the deed agrees to take 5 *l. per cent.* if it be paid within three months after it became due; if the mortgagee fail to pay at the preciſe time, he muſt afterwards pay 6 *l. per cent.*

The mortgagor did not pay the money within the three months after it became due; and the queſtion was, Whether he ſhould pay 5 *l.* or 6 *l. per cent.?*

* The Lord Keeper having taken time to conſider of the caſe, delivered his opinion, That intereſt muſt be paid at 6 *l. per cent.* for though this court relieves againſt unreaſonable penalties, yet this is not ſo, for the mortgagee might have refuſed to lend his money under 6 *l. per cent.*; if he had accepted 5 *l. per cent.* that might have altered the caſe, for there he had been his own chancellor; and if it were to be ſo, that he muſt take 5 *l. per cent.* yet he ought at leaſt to have intereſt for the intereſt from the time it ought to have been paid, for elſe it would be taking from him his legal advantage, without making him the recompence which in conſcience he ought to have; and ſo there is ſome difference between reſerving ſimply 5 *l. per cent.* and reſerving of it, as in this caſe. I cannot ſet aſide a man's agreement, he muſt pay 6 *l. per cent.* 161

Note; In this caſe was cited a caſe between † Lord *Halifax* and *Higgins*, where in ſuch caſe 5 *l. per cent.* only was allowed ‖; but there the agreement to take 5 *l. per cent.* was by a diſtinct deed. *Quære*, how that varies it?

† 2 Vern. 134. 1 Eq. abr. 28, pl. 4.

‖ In Vernon's Reports the caſe of *Halifax* and *Higgins* is thus ſtated: Money lent upon a mortgage at 5 *l. per cent.* the mortgagor covenants to pay 6 *l. per cent.* if he made default for the ſpace of ſixty days after the time of payment. The court decreed, that from default made he ſhould pay 6 *l. per cent.*: the covenant being the agreement of the parties, was not to be relieved againſt as a *penalty*.

Jolliff

Caſe 134. **Jolliff *verſus* Crew.**

Eq. abr. 286, pl. 2. S. C. 2 Eq. abr. 565, c. 3. S. C. 2 Salk. 415. S. P.—*Contrà*, 1 Vern. 251.

A legacy payable at a certain time, ſhall notwithſtanding carry intereſt *only from the time it is demanded.*

PER Lord Keeper. Though a legacy be deviſed to be paid at a certain time, yet it ſhall not carry intereſt, but from a demand made; otherwiſe of a debt; and cited *Robinſon* verſus *Holmes* in *C. B.* where lands being deviſed, upon condition to pay ſuch a ſum of money at a certain day, the non-payment at the day was adjudged no breach, without a demand and refuſal.

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Caſe 135. * **Randall *verſus* Bookey.**

Poſt, 541. Eq. abr. 272, c. 4. S. C. 6 Coke, 16. 9 Mod. 171. S. P. 2 Chan. Caſes, 115. 121. S. C. 2 Vern. 571. 644. 2 Vern. 425. S. C. 1 Wms. 390. 550. S. C. cited. 3 Wms. 22. 252. 1 Atk. 620. 21 Vin. Abr. 499. n.—*Contrà*, Ante, 31. and references.

Lands are deviſed to truſtees to ſell, and out of the money ariſing by the ſale, among other ſums, to pay to his heir at law 100 *l.* and no diſpoſition is made by the teſtator of the ſurplus of his eſtate, the land ſhall not be turned into perſonal eſtate, nor more ſold than is neceſſary to pay the legacies, and the heir ſhall have the ſurplus.

A Man makes his will, and thereby deviſeth lands to truſtees, and their heirs, upon truſt, that they ſhall permit his wife to receive the profits during her life; and after her death, ſhall ſell the lands, and out of the money ariſing by ſuch ſale, ſhall pay 150 *l.* to *J. S.* and 100 *l.* to the plaintiff *Randall* (who was the teſtator's heirs) and deviſes one moiety of a *tally*, which he had upon ſome of the public funds, to *B.* and the other moiety to his wife, and makes her executrix, and dies.

The queſtions were, what ſhould become of the ſurplus of the money that ſhould be raiſed by ſale of the lands, whether it ſhould go to the wife, who was executrix, or whether it ſhould be a truſt for the plaintiff, who was heir at law, or whether the teſtator ſhould be looked upon to die inteſtate as to that, and the ſurplus go, according to the Statute of Diſtributions, to the defendant.

It was ſaid, that here being a particular ſum deviſed to the heir out of the land deviſed to be ſold, it ſhould exclude him from any more out of theſe lands, as a particular legacy does exclude an executor from the ſurplus by the conſtruction of this court;

court; that theſe legacies muſt come out of theſe lands, for it is ſo expreſsly directed, and that is not to be ſold during the wife's life, ſo no immediate legacy is intended; that this differs from all the former caſes, for there legacies have been given for care and pains, which imports they are only truſtees; but here it is ſo expreſſed, and the particular legacy of the *tally* comes in only, becauſe, when he gives away one moiety, it was natural he ſhould diſpoſe of the reſt; and they would have read witneſſes to explain the teſtator's meaning to be ſo, but that the court would not admit †.

† Vid. 1 Eq. abr. 272, pl. 3.

* The Lord Keeper decreed an account to be taken of the perſonal eſtate; and that to be diſtributed according to the former reſolutions, there being a particular legacy given the executor; but as to the ſurplus of the money to be raiſed by ſale of the land, he ſaid, that deviſe was but in nature of a mortgage or ſecurity, and that the plaintiff paying thoſe legacies muſt have the land, though he had a particular legacy thereout, as he would have had all, if it had not been deviſed away; as if a man deviſes lands to his heir for life, yet he ſhall have the reverſion too.

Vid. Ante, 12. and references.

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Ex Toomer. 7th.

Heron *verſus* Heron.

Caſe 136.

Nicholas Heron made Sir *Nicholas Heron* and others his executors in truſt, and died; Sir *Nicholas* managed the perſonal eſtate, and kept on the ledger and journal of *Nicholas*, and from time to time made all the entries in his own hand; and therein entered the perſonal eſtate debtor to lands bought, naming them particularly, and dies, having made Sir *Nathan Heron* and Sir *Joſeph Heron* his executors. The only queſtion was, Whether theſe purchaſed lands ſhould be a truſt for thoſe who were to have the benefit of Sir *Nicholas*'s perſonal eſtate? It was decreed they ſhould not; and my Lord Keeper ſaid, this was not ſo ſtrong a caſe as ‡ *Kirk* verſus *Webb*, for there was a defect of perſonal eſtate to anſwer the demand, which in this caſe there is not.

Ante, 84. and references. Poſt, 168. 171. 2 Eq. abr. 744. S. C.

‡ Ante, 84.

Caſe 137. **Hamell *verſus* Hunt.**

Poſt, 167. 332. 421. 2 Eq. abr. 535, c. 2. S. C. ‡ 2 Roll's Abr. 90. 1 Vern. 32. ‡ 2 Vern. 430. Gilb. Rep. 146. ‡ 1 Wms. 14. 21. ‡ 34. 96. ‡ 2 Wms. 280. ‡ 1 Vez. 166. ‡ 2 Vez. 252. Salk. 226. 3 Levinz, 373. 1 Atk. 493, 494. ‡ 2 Atk. 122. 3 Atk. 525. Brown's Rep. 118. Cowper, 657.—*è contrà*, Salk. 391. 3 Brown's Parl. Caſes, 189. 297. 7 vol. 49.

Thoſe marked thus ‡ are authorities reſpecting *real property*.

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One aſſigns a term to truſtees in truſt, to permit himſelf to receive the profits during his life, and after his death in truſt, to permit his two daughters *B.* and *C.* their executors and adminiſtrators, to receive the profits during the reſidue of the term, *equally to be divided between them*, they paying ſo much within two years to his two other daughters.

A Man aſſigns a term to truſtees in truſt, to permit himſelf to receive the profits thereof during his life, and after his death, in truſt, to permit his * two daughters *B.* and *C.* their executors and adminiſtrators, to receive the profits during the reſidue of the term, *equally to be divided between them*, they paying ſo much within two years to his two other daughters.

B. dies, *C.* mortgages to *D.* and the only doubt was, Whether theſe two ſiſters were joint-tenants, or tenants in common?

The Maſter of the Rolls held, that this being a truſt of a perſonal thing, they were tenants in common; and that the father's intention appears ſo in the conſideration, which was, to make ſeveral and diſtinct proviſions for his two daughters, and the paying of the ſums appointed to their two ſiſters, makes them purchaſers †.

† Vid. the caſe of *Clerk* v. *Clerk*, 2 Vern. 323, where a deviſe to two, equally to be divided, and *to the ſurvivor* of them, was held a joint-tenancy. Vid. 2 Wms. 347. 529. 4 Brown's Parl. Caſes, 224. where the gift of a *reſidue* to two or more, is held a joint-bequeſt, with the benefit of ſurvivorſhip. 3 Wms. 115, the ſame point and determination. See 1 Coke's Inſt. Harg. ed. 190. b. n.

Termino S. Trinitatis,

1701.

In Curia Cancellariæ.

Stribblehill *verſus* Brett. Caſe 138.

2 Vern. 446. S. C. Parl. Caſes, 76. S. C. 2 Eq. abr. 585, c. 1. Viner, vol. 10. 286, pl. 27. vol. 14, p. 160, pl. 4. vol. 15, p. 265, pl. 10. 3 Leon. 411. S. P. 1 Vezey, 505.

A leaſe made by tenant for life purſuant to his power, but for a marriage brokage, and ſo an unlawful conſideration; decreed after his death to be ſet aſide, and to be no truſt for his executors, as it was urged it ſhould, the conſideration being as none.

MR. *Thomas Thynn* of *Long-Leet*, was ſeiſed for life of the rectory impropriate of *Thame* in *Com. Oxon.* and ſeveral other lands, with power to make leaſes, remainder to his firſt and other ſons, remainder to the Lord Viſcount *Weymouth*. Mr. *Thomas Thynn* demiſed this rectory for 99 years, if three lives lived ſo long, in truſt for Mr. *Thomas Thynn* of *Egham*, and died *anno* 1681; and ſoon after his death, the Lord *Weymouth* made another leaſe of the ſame rectory, in truſt for the ſame Mr. *Thynn* of *Egham*, who wanting money, borrowed 2000*l.* of the plaintiff's inteſtate, and theſe two leaſes were mortgaged to him for ſecuring of it, and then he died inteſtate; and the plaintiff took out adminiſtration to him, and Mr. *Thynn* of *Egham* died much indebted, and his wife (who was a defendant) was his adminiſtratrix; the lives mentioned in the firſt leaſe died, and thereby that leaſe expired.

In avoidance of the plaintiff's title under the leaſe made by my Lord *Weymouth*, the defendants, the *Bretts*, ſet up a title under

166 under a leaſe, purporting to be made by * Mr. *Thomas Thynn* of *Long-Leet* in 1681, a little before his death, to their uncle Major *Brett*, for the conſideration of 3600*l.* and that their uncle had before his death made a voluntary aſſignment of it to them.

The plaintiffs ſaid, that though this leaſe imported to be made for 3600*l.* yet no money was ever really paid; and that, if the leaſe were really made, it was upon a marriage brokage for Major *Brett*'s procuring a marriage between Mr. *Thynn* and Lady *Ogle*, and the proof ſeemed to be pretty ſtrong for that purpoſe.

The defendants objected two things, 1*ſt*. That the plaintiff had not made any ſufficient proof, that the leaſe was made on any ſuch conſideration as they pretended; and it could not be expected, that after ſuch a length of time as 20 years, proof ſhould be made of the payment of the conſideration money, eſpecially by the defendants, who were aſſignees and ſtrangers; and that if the conſideration were not paid, then the leaſe muſt at moſt be in equity but a truſt for Mr. *Thynn*, and conſequently for his executors, and they were not parties to the ſuit.

2*dly*, That the plaintiff is not entitled to controvert this leaſe, for he does not claim under or in privity to Mr. *Thynn* that made the leaſe, and was but tenant for life, and (whoſe executor muſt be entitled to the benefit of this leaſe, if it be a truſt) but under the Lord *Weymouth*, who is a remainder-man.

It was anſwered, That the plaintiff's proofs were ſufficient, and that a feigned conſideration was worſe than no conſideration; for in the latter caſe it may be intended a voluntary gift, and the fancy of its being a truſt is idle; it is a leaſe ill obtained, and the decree muſt have been, not that it ſhould be a truſt for Mr. *Thynn*, but that it ſhould be ſet aſide, and then my Lord *Weymouth* would have had the benefit of it, and ſo muſt his grantee.

Lord

Lord Keeper. If it be a leaſe for a marriage brokage, it muſt be ſet aſide, being *ex turpi cauſa*, and no difference * between a bond, or leaſe, and an inheritance; but I think the proof is not full enough to found a decree upon, therefore let it be tried at law, whether the procuring the marriage were the conſideration of this leaſe. (167)

‖ Afterwards it was twice tried at law, and *two verdicts* for the defendant, and thereupon the bill was diſmiſſed; but upon appeal to the Lords, they reverſed the decree, and ſet aſide the leaſe without regard to the verdicts.

‖ Vid. 1 Vezey, 509. Lord *H.*'s obſervation. 1 Brown's Parl. Caſes, 57. and note 60. ibid.

David Phillips *verſus* Eliz. Phillips. Caſe 139.

Eq. abr. 292, pl. 6. S. C. 2 Vern. 430. S. C. † 1 Wms. 34. S. C. Antè, 169. and references. Poſt, 332. 491. 3 Brown's Parl. Caſes, 297.

AFTER hearing of this cauſe, my Lord Keeper ordered a caſe to be ſtated, and ſent to the Juſtices of the Common Pleas for their opinion, which was done accordingly, and the caſe with their certificate was as follows:

One deviſes lands to truſtees, and their heirs, in truſt, that the profits *ſhall be equally divided between Elizabeth* my wife, and *Martha* my daughter and heir of the teſtator, during the natural life of the ſaid *Elizabeth*; and after her death, I give and deviſe the lands to my ſaid truſtees and their heirs, to the uſe of the

That *William Phillips*, by his laſt will and teſtament, in writing, did diſpoſe of his eſtate in theſe words; *viz.* I give, deviſe, and bequeath, all my houſes, lands, tenements, and hereditaments, with their appurtenances, lying in the ſeveral counties of *Denbigh* and *Flint*, or elſewhere, in the kingdom of *England*, to my well-beloved friends *Samuel Powell* and *Roger Tennings*, and their heirs, in truſt, and to the intent that the profits thereof *ſhall be equally divided between Elizabeth my wife, and my* ſaid *Martha*, and the heirs of her body, with ſeveral remainders over, and dies. *Martha* dies without iſſue, and *Elizabeth* is ſtill living. By the opinion of all the juſtices of *C. B. Elizabeth* and *Martha* were but tenants in common, and *Elizabeth* ſhall have the moiety of the profits during her life; and the other moiety by the Statute of Frauds and Perjuries (taking away occupancy) belongs to the executors or adminiſtrators of *Martha*, as before that ſtatute it would have belonged to the heir of *Martha*, and of the teſtator, as profits undiſpoſed of and reſulting to him.

† This caſe is much more fully and accurately ſtated in 1 Wms. 34. It was firſt heard at the Rolls, and determined to be a joint-tenancy, and conſequently that all ſurvived to the mother. Upon appeal before Lord *Somers*, it was held to be a tenancy in common, and that *Martha*'s eſtate determining by her death, the remainder-man or reverſioner had a right to the moiety. Afterwards, upon a rehearing, Lord Keeper *Wright* held, that an eſtate by implication aroſe to the mother in the daughter's moiety after her death; but the judges of *C. B.* upon a caſe being made for their opinion, determined the point, as here reported.

daughter Martha Phillips, for and during the natural life of the ſaid Elizabeth; and after her death, I give and deviſe the ſaid houſes, lands, &c. to my ſaid truſtees, and their heirs, *to the uſe of the ſaid Martha, and the heirs of her body, for ever, with ſeveral remainders over*; and dies, and *Elizabeth* his wife is ſtill living.

168 * The ſole queſtion was, Whether *Elizabeth*, on the death of *Martha* without iſſue, ought by ſurvivorſhip, implication of law, or otherwiſe, to have the whole profits during life, or only one moiety thereof, and the plaintiff the other during *Elizabeth*'s life, as heir at law to the ſaid *William* and *Martha*, as profits undiſpoſed of, and reſulting to him? And by certificate of all the judges of *C. B.* on hearing counſel, *Elizabeth* and *Martha* being tenants in common, during the life of *Elizabeth*, at *Martha*'s death her moiety belongs to her executor or adminiſtrator, by the Statute of Frauds and Perjuries, ſubſcribed by all the four judges.

Note; There had been a decree for the now defendant, then plaintiff, to have the whole during life, taking that to be the plain intent of the teſtator, and that decree was ſigned and inrolled; the then defendant, now plaintiff, did not in that caſe inſiſt upon any title as heir, and therefore brought this bill upon that title, and conceiving himſelf to be entitled to a moiety during the life of *Elizabeth*, as an undiſpoſed intereſt, ſhe having but a moiety given her.

Caſe 140. Halcott *verſus* Markant.

2 Eq. abr. 744, c. 3. S. C. Antè, 84. 163. 2 Wms. 414. S. P. and S. C. in the margin.

An executor by the very will impowered to purchaſe lands for the heir; yet the purchaſe being in his own name, and he dead inſolvent, as to the other aſſets the heir could not follow the land to make it a truſt for him, though the executor had told the mother of the purchaſe he was about to make, and had her conſent; and ſo the executor's heirs went away with the land for want of expreſs proof of the application of the truſt-money.

THE plaintiff's late father left the plaintiff, his ſon and heir, a young infant, and by his will made the defendant's late huſband and others his executors, and guardians and truſtees for the plaintiff, and impowered them, if they thought fit, to lay out the perſonal eſtate in land, and cauſe it to be ſettled on the plaintiff and his heirs.

Markant

Markant (who was the ſole, or at leaſt the principal acting truſtee) being about to ſell part of the perſonal eſtate of the teſtator, told the plaintiff's mother of it, and that he ſhould have money in his hands, and was * about buying an eſtate, called *Greſſing-Hall*, for the plaintiff the infant, and aſked her conſent, which ſhe gave, and ſo it was proved in the cauſe; and afterwards he bought that eſtate, but took a conveyance in his own name, and no truſt in writing ever declared for the plaintiff; but it was proved in the cauſe, that he had ſeveral times declared, that it muſt be ſold to make the plaintiff ſatisfaction, and afterwards he died inteſtate and inſolvent. 169

The queſtion was, Whether his heir ſhould have the land, or whether it ſhould be in truſt for the plaintiff, or be ſold to make him ſatisfaction?

The Maſter of the Rolls was very inclinable to help the plaintiff as far as might be, and ſaid, he thought the caſe of † *Kirk* verſus *Webb* did not govern this caſe; for there the party did not know himſelf to be a truſtee, and had diſpoſed of the lands: he cited the caſe of *Meers* verſus *St. John*, and 4 *Inſt.* title *Court of Chancery*, and ſaid, here is a good foundation for a truſt, for here is a commencement of a truſt by the will in writing, and *Markant* had declared, that *Greſſing-Hall* muſt go to ſatisfy the infant, and why then ſhould not the lands in the hands of his heir ſtand charged to make good what the perſonal eſtate falls ſhort? and perhaps this may be a reſulting truſt; and decreed an account of the perſonal eſtate; † Antè, 68. 84

But afterwards diſmiſſed the bill, as to the *Greſſing-Hall* eſtate, and ſaid, it was too hard for him, becauſe there was no expreſs proof of the application of the truſt-money.

170

Caſe 141.

† Vachell *verſus* Jeffereys.

Antè, 12. and references. 2 Eq. abr. 435, c. 7. S. C. 1 Wms. 548. S. C. cited. Brown's Rep. 333, 334. S. C. cited and commented upon by Lord *Loughborough*, in the deciſion of *Bowker v. Hunter*.

A. deviſes to *B.* and *C.* his wife's children (as he called them, not owning them to be his) 10*s.* apiece, and no more, and gave the children that he owned conſiderable legacies; *B.* and *C.* ſhall come in for a ſhare of the undiſpoſed ſurplus, for the words of excluſion muſt be taken ſtrictly.

MR. *Bretton* had two children by his wife, and afterwards he grew into a diſlike of her, and parted with her, and ſhe had two children more, which he * never would own to be his; he married his eldeſt daughter, and gave her a conſiderable portion, and afterwards made his will, and gave to the two children which he owned conſiderable legacies, and then deviſes in this manner; *Item*, I will, that my executors ſhall pay to *A.* and *B.* the children of my wife 10*s.* apiece, and no more. Then he deviſed legacies to his executors, but did not mention them to be for their care and pains, or any thing to that purpoſe.

The 1*ſt* queſtion was, Whether the executors ſhould have the ſurplus of the eſtate? And it was decreed that they ſhould not, but that it muſt be diſtributed according to the former reſolutions.

2*dly*, Whether theſe two children, which the teſtator did not own, ſhould come in for a ſhare? And it was decreed that they ſhould, for the words of excluſion are not plainly expreſſed; and ſhall be taken ſtrictly in this caſe.

Poſt, 184. S. P. *è contrà*.

Where a perſon dies inteſtate *quoad* a ſurplus of his perſonal eſtate, a daughter advanced by him in marriage need not bring the portion into *hotch-potch*, to entitle her to a diſtribution ſhare.

3*dly*, Whether the married daughter's portion ſhould be brought into *hotch-potch*? And it was decreed that it ſhould not, but ſhe to have her ſhare with the reſt; and the difference as to bringing into *hotch-potch* was ſaid to be between perſons dying wholly inteſtate, and dying inteſtate *quoad* a ſurplus.

Doubt this decision, & incline to the contrary see post. fol. 184.

† This caſe is much more amply and accurately ſtated in 1 Brown's Parl. Caſes, 167. There was an appeal to the Houſe of Lords from this decree, and that part of it reſpecting the ſecond point was reverſed. Ibidem, 171.

*DE 171

Termino S. Mich.

1701.

In Curia Cancellariæ.

Loyd *verſus* Cardy. Caſe 142.

3 Wms. 313. S. C. n. Other caſes reſpecting this writ are to be found in 1 Wms. 263. Caſes temp. Talb. 196. 1 Atk. 521. 2 Atk. 66. 210. 3 Atk. 409. 501. Brown's Rep. 376.

A ſolicitor's bill being taxed and reported overpaid 60*l.* the client on motion and affidavit of his being about to go beyond ſea, had a *Ne exeat Regno*, though no bill in court whereon to ground this writ.

THE defendant in this caſe being adviſed he had paid one *Nailor*, who was his ſolicitor in this cauſe, more money than could be due to him, obtained an order to have his bills referred and taxed, which was done; and upon the taxation he was reported to be overpaid 60*l.*

Thereupon he moved the court for a *Ne exeat Regno* againſt *Naylor*, on affidavit that he was going beyond ſea with my Lord *Cornbury*, the governor of *Jamaica*; and the writ was granted by the Maſter of the Rolls in the abſence of my Lord Keeper, *though there was no bill in court whereon to ground this writ* †.

† 3 Wms. 313. S. P. & *contrà*.

Caſe 143.

Kinder *verſus* Miller.

† 2 Vern. 440. S. C. 2 Eq. abr. 744, c. 4. S. C. Antè, 84.

A. dies inteſtate, leaving a wife and two daughters; after his death 500 *l.* is found in the houſe; the widow lays out this money in lands, and ſettles it to the uſe of herſelf for life, remainder to her own right heirs; after the death of the mother and two daughters, plaintiff, as adminiſtrator to the daughters, brings a bill againſt the heir at law, to have two thirds of the 500 *l.* out of the land as perſonal eſtate; which was decreed accordingly by the Maſter of the Rolls, but reverſed by my Lord Keeper.

J. S. died inteſtate, leaving a wife and two daughters, infants, and they became entitled to his perſonal eſtate in thirds, which amounted to 900 *l.* The widow * takes out adminiſtration, and within two months after laid out 500 *l.* (part of the money left by the inteſtate in his houſe at his death, as was proved in the cauſe) in the purchaſe of lands, and the conveyance was to herſelf and her heirs; and there was no declaration of any truſt in the deed, nor was ſhe ſo much as mentioned therein to be adminiſtratrix to her huſband.

Afterwards ſhe conveyed theſe lands to truſtees and their heirs, to the uſe of herſelf for life; and after, as to one moiety, to the uſe of one daughter, and the heirs of her body; and as to the other moiety to the other daughter, and the heirs of her body, with croſs remainders, with remainder of the whole to her own right heirs.

The daughters afterwards both married, and died, and the mother died; the huſband of the ſurviving daughter took out adminiſtration to his wife and her ſiſter, and brought this bill againſt the heir of the mother to have this land made perſonal eſtate, and to have two thirds of it, as being purchaſed with the money which belonged to the daughters to whom he was adminiſtrator.

The defendants inſiſted on the Statute of Frauds and Perjuries, and that theſe lands could not be ſubject to any demands of the plaintiff, there being no declaration of truſt in writing; and the caſe of † *Kirk* verſus *Webb* was cited and relied on.

† Antè, 84.

The Maſter of the Rolls ſaid that caſe did not govern this, but ſtood on its own bottom, and that here was an intereſt veſted in the daughters by the Statute of Diſtributions; and

† Reported in Vernon, under the title of *Kendar* v. *Milward*.

ſaid,

ſaid, it would be very miſchievous to infants, if their money might be inveſted in land, and that land not liable to make them ſatisfaction; and therefore he decreed that the land ſhould ſtand charged with two thirds of the purchaſe-money for the plaintiff, and if it were not paid, the land to be ſold; but this decree was after reverſed by my Lord Keeper *Wright*, as contrary to the caſe of *Kirk* verſus *Webb*.

Brtpe Amth. 413. 2. Atk. 150.

* Neal *verſus* Hanbury.

Caſe 144.

2 Eq. abr.ª 362, c. 6. S. C.

John Neal by his will deviſes 5 *l. per ann.* to his nephew *Thomas Neal* (without adding to his executors or adminiſtrators) to be paid half yearly during the life of his wife, on condition he behave himſelf civilly to her, for he was a very lewd diſſolute man, and made his wife executrix, and died; and ſhe intermarried with the defendant *Hanbury*.

A. deviſes to his nephew 5 *l. per ann.* (without ſaying to his executors or adminiſtrators) to be paid him during his the teſtator's wife's life, whom he made executrix, on condition that he demeaned himſelf civilly to her. By his death the 5 *l. per ann.* is determined.

Thomas Neal the deviſee died, and his wife the plaintiff was his adminiſtratrix, and brought this bill *in forma pauperis*, to have the payment of the 5 *l. per ann.* during the life of the executrix of *John*.

But the Maſter of the Rolls ſaid this is a perſonal bequeſt to *Thomas*; and it is upon condition he demean himſelf civilly to the executrix, which cannot be after he is dead, therefore I cannot make a new will; the bill muſt be diſmiſſed.

† Aplyn *verſus* Brewer.

Caſe 145.

2 Vern. 504. 515. 1 Wms. 83. 241. 3 Atk. 584.—*è contrà*, Hardreſs, 314. Cro. El. 318. Salk. 318. Cro. Car. 312. 1 Barnes's Notes, C. B. *Champneys* v. *Brown*. 2. Bro. 114.

A Man made ſeveral executors, who all joined in ſale of the teſtator's goods, but one only received the money, and he afterwards became inſolvent.

Executors who all join in a ſale, ſhall be all charged, though one only receives the money: *ſecus* of truſtees.

Per

† In the caſe of *Weſtley* and another v. *Clark* and *Betts*, Trin. Term. *G.* 2. *June* 25, 1759, determined *è contrà* by the late Lord Chancellor *Northington*—*M. Smith* by will (*inter al'*) gave to the two plaintiffs legacies of 300 *l.* and 100 *l.* and the reſidue of his perſonal eſtate to his widow, and appointed *Clark*, *Betts*, and *Thompſon*, his executors,

Per Lord Keeper. All who acted by joining in the ſale ſhall be charged. Yet lately before, in the caſe of *Heaton* and *Marriot*, where a perſon had made a conveyance to *ſeveral truſtees* for payment of debts, and they all joined in the ſale, and one only received the money and became inſolvent, the others were not charged.

1 Vern. 174
Caſe 146.

* Farr *verſus* Middleton.

2 Eq. abr. 466, c. 9. S. C.

A. Treats for a purchaſe with *B.* and the lands to be purchaſed were incumbered with mortgages and judgments; the purchaſe-money being agreed, was returned to *London*, and placed in an indifferent hand, to be paid in diſcharge of thoſe incumbrances, when the *quantum* of them ſhould be adjudged, and aſſignments made; but before that was done, the purchaſer died, and did not leave ſufficient aſſets to pay his debts upon bond.

The queſtion was, Whether the money depoſited as aforeſaid, ſhould be aſſets of the purchaſer, and be applied to pay his debts, or muſt be applied to pay off the real incumbrances on the purchaſed eſtate? For if it were to be applied to pay off theſe incumbrances, then the creditors of the purchaſer muſt loſe their debts; but if otherwiſe, then the mortgagees, *&c.* would

tutors, with the uſual clauſe, that one of his executors ſhould not be anſwerable for the acts of the other. Part of the teſtator's eſtate was out upon mortgage. *Thompſon*, who was an attorney, after the teſtator's death called in the mortgage, and received the money: he ſent his clerk with the aſſignment of the mortgage to his two co-executors, who executed the ſame, and ſigned a receipt indorſed thereon. *T.* became a bankrupt without having accounted for theſe monies, and the legatees filed their bill to charge *C.* and *B.* inſiſting that they were liable.—Lord *N.* obſerved, the claim appeared to be founded upon the general rule of law, that the executors were all liable, whether they had received the money or not, for which they had joined in a receipt, but otherwiſe with reſpect to truſtees: that ſuch a diſtinction was by no means preciſe enough to ground an eſtabliſhed rule, and that it did not appear to him to be well founded. A joint receipt might be rebutted by other circumſtances, as evidence of one only having *actually received the money*: that the authority of *Churchill* verſus *Hobſon* reſted upon particular circumſtances, and by no means furniſhed any particular rule. He did not ſee any ground for a court of conſcience to ſay, "I make you liable although you did not receive, merely becauſe you have ſigned a receipt." That in the preſent caſe the equity was ſo obvious, that ~~nothing could~~ it would weigh with him againſt any rule laid down at any period: *T.* called in the money without the concurrence of his co-executors, which he certainly had a right to do; *T.* acted as the attorney as well as executor: that it was entirely the tranſaction of *T.* and the other executors joined in a receipt merely as a point of form; and decreed that the co-executors were not liable.

be

be paid out of the land, by virtue of their ſecurities, and the creditors would have their ſatisfaction out of the money, and ſo all might be paid.

My Lord Keeper was of opinion, that the money was bound by the agreement, and muſt be applied to pay off the incumbrances.

Jones *verſus* Baſſet. Caſe 147.

2 Eq. abr. 426, c. 1. S. C. Treatiſe on Pleadings in Can. 25.

A Perſon who was adminiſtrator *durante minori ætate* of two infants, and entitled to a ſhare of the inteſtate's eſtate in his own right, brought a bill for a diſcovery and account, and proceeded ſo far as to examination of witneſſes, and then got his own ſhare, and let the ſuit drop.

By the infant's coming of age, adminiſtration *durante minori ætate* ceaſes, and ſuit by ſuch adminiſtration is thereby determined, ſo that the infant cannot go on therewith, but muſt begin anew, unleſs a decree to account were had; in which caſe the infant, on a bill brought for that purpoſe, may be allowed to go on therewith.

* After the infants coming of age it was moved to have the benefit of theſe proceedings, and to carry on the cauſe. 175

My Lord Keeper thought it reaſonable, if it could be done, that they might not be turned round to begin all anew, but thought the ſuit quite dead, and at an end, by the infants coming of age, whereby the adminiſtration *durante minori ætate* determined, and aſked the bar if any ſuch thing had ever been done. It was anſwered that the like had been done once by my Lord Chancellor *Somers*, in the caſe of *Davis* verſus *Davis*, where an adminiſtrator *durante minori ætate* proceeded to a decree and account before the Maſter; and then the infant coming of age, and praying, it was allowed to go on, though much oppoſed; but here it would not be granted, for *Davis*'s caſe had proceeded to a decree; and though the plaintiff there was adminiſtrator *durante minori ætate*, yet it was *cum teſtamento annexo*, which by him made ſome difference; and the infant there had brought a bill to have the benefit of the ſaid proceedings, and offered to be bound by them.

Jaggard

Caſe 148.
6 December.
2 Eq. abr. 717. n. S. C.

A. before marriage covenants to ſettle lands, in conſideration of 2000*l.* portion, on himſelf for life; remainder to their firſt and other ſons in tail; remainder to the daughters in tail; remainder to himſelf in fee, with a power of revocation reſerved to the wife's father then beyond ſea.

Jaggard *verſus* Jaggard & al', & econt'.

MR. *Jaggard*, on his marriage with Mr. *Sutton*'s daughter, in conſideration of that marriage, and 2000*l.* portion, covenants to ſettle certain houſes, particularly named in the deed, and all other his freehold eſtate, to the uſe of himſelf for life for her jointure, then to the firſt and other ſons of that marriage in tail male; and for want of ſuch iſſue to the daughters in tail male, with remainder to himſelf in fee; * and in the deed was a *proviſo* that Mr. *Sutton*, the wife's father, ſhould have power by deed, *&c.* to revoke all the uſes: he was a merchant, and at that time beyond ſea, where he lived a long time.

The marriage is had, and a daughter born, and the huſband being taken ſick, deviſes 1500*l.* to his daughter; and if his wife (being *enſeint*) ſhould have a poſthumous daughter, ſhe to have 500*l.* of the 1500*l.* and if either died before 21, or marriage, the ſurvivor to have the whole; and gave all his lands to his wife and her heirs, and the ſurplus of his perſonal eſtate, after debts paid, to his wife, her executors, and makes his wife executrix: then another daughter is born, and the huſband dies without any alteration of his will, or any ſettlement made. Decreed that a ſettlement be made, with a power of revocation to the father; and that legacies be likewiſe paid the children, the youngeſt daughter being a poſthumous child, within the intent of the will.

176 The marriage took effect, and he had iſſue a daughter; and his wife being again *enſeint* with a child, he was taken ſick, and made his will, and thereby deviſed 1500*l.* to his daughter; and if his wife ſhould have a poſthumous daughter, ſhe to have 500*l.* of the 1500*l.*; and if either died before 21 or marriage, the ſurvivor to have the whole; and gave all his freehold eſtate to his wife and her heirs, and the ſurplus of his perſonal eſtate, after debts paid, to her, her executors, and adminiſtrators; and if the perſonal eſtate was not ſufficient to pay his debts, the real eſtate to be charged with them; and makes his wife executrix, and hath another daughter born; and then dies without any alteration of his will, and without making any ſettlement purſuant to the articles.

The widow inſiſted, that no ſettlement ought to be made; for that, if it had been made, her father might revoke it, and ſo her huſband would then have it free, and have power to deviſe it, and therefore ſhe was well entitled to it by the will; and that theſe legacies ſhould be intended to be deviſed in ſatisfac-

tion of the ſettlement; and that it muſt be ſo intended, for that they had no other real eſtate but that which was covenanted to be ſettled, and that they muſt either accept them ſo, or not have them.

She likewiſe inſiſted, that the youngeſt daughter, being born in the life-time of her father, was not a poſthumous child, and therefore not entitled to the 500*l.*; and the childrens bill was to have the ſettlement made, and to have their legacies.

They inſiſted, that as the will did not mention thoſe legacies to be in lieu of the ſettlement, there was no neceſſity to think he ſo intended, for he was to have the reverſion in fee of the ſettled lands, and that was * ſufficient to ſatisfy the words of the 177
will, and was valuable too, for if the infants died before 21, ſhe will have it; or if they ſhould live to that age, yet during the mother's life they could not ſuffer a recovery to bar it; beſides, they had no proviſion during the life of the mother; and therefore it was reaſonably to be intended he meant theſe legacies for that purpoſe, for their better advancement in marriage; for by the ſettlement they were only to have a remainder in tail, and the huſband would have nothing, if his wife died before ſhe could ſuffer a recovery, which could not be during her infancy, nor during the life of her mother.

This cauſe was heard before my Lord Chancellor *Somers*, and as to the firſt point, he declared, the youngeſt daughter, though born in the life-time of her father, to be a poſthumous child within the meaning of the will, and well entitled to the 500*l.*

But as to the other point of the ſettlement, he reſpited his judgment, and directed a letter to be wrote to Mr. *Sutton*, to know whether he would revoke the ſettlement.

The cauſe coming on this day before the Lord Keeper *Wright*, upon the point of the ſettlement, he ſaid, he would not decree the legacies to be in ſatisfaction of the ſettlement; and therefore decreed an account of the perſonal eſtate, and the infants legacies to be put out by the Maſter, ſubject to the contingencies in the will, and that the ſettlement ſhould be made purſuant to the

the articles, and there was to be a proviſion in it for Mr. *Sutton* to revoke, &c.

178

Caſe 149.

* Halford *verſus* Byron.

3 Eq. abr. 188, c. 1. S. C.

A. bound to *B.* in a bond of 1000 *l.* for payment of 500 *l.* after *A.* and *C.* as his ſurety, give a bond to *B.* of 200 *l.* for payment of 100 *l.* as a further ſecurity for ſo much of the 500 *l.* Then *A.* aſſigns a judgment to *B.* of 500 *l.* towards farther ſatisfaction of the debt, and *B.* receives ſeveral ſums on his judgment; and *A.* by the conſent of *B.* receives 30 *l.* alſo part of the money ſecured on this judgment. This ſhall not go in exoneration of any part of the money ſecured by the 200 *l.* bond, as it would do, if *B.* had actually received it, and lent it to *A.*

A. Was bound to *B.* in 1000 *l.* for payment of 480 *l.*; afterwards *A.* being robbed of 495 guineas, *B.* thought his money in danger, and preſſed *A.* for it, who got *C.* his brother-in-law, to be bound with him to *B.* in a 200 *l.* bond, to pay 100 *l.* and intereſt, as a farther ſecurity for ſo much of the 480 *l.*; then *A.* brings an action againſt the Hundred, and recovers 540 *l.* and aſſigns the judgment to *B.* and *D.* (his own attorney) towards ſatisfaction of the debt; and the ſheriff paid ſeveral ſums to *B.* and 80 *l.* part of the judgment, was paid to *A.* by *B.*'s conſent: and if this ſhould be reckoned as paid to *B.* at leaſt ſo as to exonerate *C. pro tanto*, was the queſtion.

My Lord Keeper held, that it ſhould not, becauſe that this aſſignment of the judgment was but as a farther ſecurity for the money due on the 1000 *l.* bond; and as the obligee had got it, ſo he might releaſe or diſcharge it, as he thought fit, and the ſurety is not hurt by it; otherwiſe it would be, if the money had been once actually paid to *B.* and after lent again to *A.* So decreed an account to be taken of what due on the 1000 *l.* bond, and what due on the 200 *l.* bond, for principal, intereſt, and coſts, or ſo much leſs as remained due on the 1000 *l.* bond, and the 200 *l.* bond to be delivered up.

Biſhop

* Biſhop *verſus* Godfrey & al', Executors of John Swift. 179

Caſe 150.

Antè, 79. and references.

AN executor pays bond debts before money, on a decree againſt his teſtator. *Per Cur.* Clearly he ſhall not be allowed thoſe payments in his account, becauſe the decree here is equal to a judgment at law.

A decree equal to a judgment at law.

Hopton *verſus* Dryden.

Caſe 151.

2 Eq. abr. 450, c. 2. S. C.

Robert Clerkſon and one *Founds*, were partners in the trade of a mercer; *Clerkſon* is indebted by bond to *Edward Hopton* in 2000 *l.* to which the plaintiff was entitled as his repreſentative, and in 1300 *l.* to *Dryden*, the defendant's teſtator, for which he and *Founds* were bound. *Clerkſon* made his will, and thereof *Dryden* and another executors, and deviſes his lands to them, and their heirs, ſhare and ſhare alike, to be ſold for payment of his debts, and died: they employed the greateſt part of his perſonal eſtate in paying off a mortgage of 2000 *l.* charged on the real eſtate deviſed for payment of debts; but kept it on foot, and took an aſſignment thereof to themſelves; and *Clerkſon* had alſo a bond taken in *Dryden*'s name for money due to *Clerkſon*.

Executor of an executor may retain towards ſatisfaction of the debt owing by the firſt teſtator, becauſe he is executor of the firſt teſtator; but if one be indebted by bond to *A.* and makes *A.* and *B.* executors, and dies, and then *A.* makes *C.* executor, and dies, in this caſe *C.* cannot retain, becauſe he is not executor of the firſt teſtator; but *B.* is his executor by ſurviviorſhip; and the only reaſon of allowing retainer, is becauſe the executor cannot ſue himſelf.

The plaintiff brought his bill againſt the executors of *Clerkſon* for a diſcovery of aſſets, and to have a ſatisfaction of his debt. *Dryden* in his anſwer inſiſts to retain out of the real eſtate, when ſold, and alſo out of the perſonal eſtate, to pay his own debt. The cauſe proceeded to hearing, and a decree for an account; but before any farther proceedings, *Dryden* dies, having made his will, and the defendant *Dryden*, his wife, executrix, * (who was before executrix of *Founds*) and the cauſe was revived againſt her. 180

For the defendant it was inſiſted, that the mortgage being paid off with the aſſets, which *Dryden* her teſtator might have retained towards his own ſatisfaction, and the mortgage being kept on foot, they in whom it is ought ſurely, in a court of equity, to be looked on as truſtees for the defendant for any juſt demand he had on the eſtate, or paid off with aſſets, which he might have retained; and ſo it will be for the real eſtate too, if *Dryden* and the other executor were tenants in common, as it was urged they were; and that a court of equity could not take them from them till they were paid. The reaſon of retainer by an executor is, becauſe he cannot ſue himſelf; and the reaſon as to the heir is the ſame, and the law muſt be ſo too, though there is no inſtance of it.

For the plaintiff it was inſiſted, that the defendant, as executrix to the firſt teſtator *Clerkſon*, cannot pretend a right of retainer, for ſhe is not his executrix, for her teſtator was not the ſurviving executor of *Clerkſon*, but the other executor, who is ſtill living; and the words of the deviſe of the real eſtate do not make a tenancy in common, and then ſhe has no capacity of retaining; it was agreed, *Dryden* might have retained, but was not forced to it, *nolens volens*, as was ſaid on the other ſide, though, *primâ facie*, it might be looked on as a retainer. The teſtator deviſed the mortgage to be paid off out of his perſonal eſtate, and then to be ſold to pay 2000*l.* to his grandſon, which they have done, and therefore, *pro tanto*, have renounced their right of retainer; and this debt, for which the defendant would retain, was the debt of *Founds*, as well as of *Clerkſon*, they being partners and co-obligors, and ſhe is executrix of *Founds* alſo, and hath aſſets of his to pay, and therefore could retain only for a moiety of it.

Lord Keeper. An executor of an executor may retain, but
181 not in this caſe; the land being deviſed to * the executors, ſhare and ſhare alike, makes, I think, a tenancy in common; but here the executor of the executor is *not the executor to the firſt teſtator*, and therefore cannot retain, and the perſonal aſſets are gone; and the queſtion is now, as to the real eſtate, and in equity

equity all debts are equal; and therefore, if you muſt come here, you cannot prefer yourſelf, and a court of equity will never aſſiſt a retainer; and theſe being only equitable aſſets, you ought not to retain to pay all, but only a proportionable part; and *as to the bond*, you are a truſtee, and therefore that muſt follow the ſame rule †.

† 2 Wms. 298.

DE

Termino S. Hillarii,

1701.

In Curia Cancellariæ.

Caſe 152.

Ward *verſus* Lant.

2 Eq. abr. 769, c. 2. S. C.

One executes a voluntary bond of 5000 *l.* to one of his daughters without any condition, and payable immediately, but always kept it by him; and it was proved to be made to ſcreen himſelf from taxes, and ſo eſteemed by that daughter; and he by will gives portions to all his daughters, and dies: this bond decreed to be ſet aſide.

MR. *Andrew Lant* had four daughters, and in 1673 made his will, and deviſed to one 1000 *l.* and by the ſame will deviſed to them 1500 *l.* apiece for their portions, which laſt ſums of 1500 *l.* were to be raiſed out of a real eſtate, deviſed by his will for that purpoſe; afterwards he marries one of his daughters to Mr. *Francis Lane*, and gives her 4000 *l.* portion, and afterwards executes a bond of 5000 *l.* to another daughter, but kept it by him, and it was found amongſt his papers after his death; and there was ſome proof in the cauſe, that this bond was entered into to defend him from paying taxes for his money; and there was ſome proof likewiſe, that he had told his daughter, not long before his death, that he intended her the benefit of the bond. It was plain he had forgot his will, for he died not till 1694; and had often ſaid, he had no will, and it was not found till ſome years after his death. By the ſaid will he had given his wife (whom he made ſole executrix) ſome legacies, but had made no diſpoſition of the ſurplus of his eſtate. And the ſeveral queſtions that were made in the caſe were,

1ſt.

* 1*ſt*. Whether this bond were to be paid to the daughter, or to be ſet aſide? 183

2*dly*. If it were to be paid, then, Whether it ſhould be taken as a ſatisfaction of the legacies deviſed to her, or a revocation of the will as to them; and whether the unpreferred daughter ſhould be made equal out of the ſurplus before any diſtribution (if any were to be made in this caſe)?

3*dly*. If there be not a difference where the wife has a legacy, and is made executrix, and the ſurplus not diſpoſed, and where a ſtranger is; and if ſhe ſhall not have the ſurplus to her own uſe, though a ſtranger ſhould not, eſpecially in this caſe, when the will was made in 1673, and the courſe of diſtributing the ſurplus not introduced till long after, and therefore not to be carried on in equity, to take it from the widow, when the law was not ſo at that time?

My Lord Keeper was of opinion, that though there was no fraud or circumvention in obtaining the bond from Mr. *Lant*; yet that it appeared to be his intention, that no uſe ſhould be made of it, for the bond was without any condition, and payable immediately, and he always kept it by him; and therefore, if ſhe had got it from him, and put it in ſuit againſt him in his life-time, he thought equity would have relieved him againſt it; that he always declared, that he intended his daughters equal, and equality is the higheſt equity; and the daughter herſelf took the bond to be only to protect him from taxes; and being voluntary, and only done for that ſpecial purpoſe, it is a truſt for himſelf, as this caſe is; and therefore decreed it to be ſet aſide, this daughter being equal to the reſt without that bond.

† As to Mr. *Lane*'s 4000 *l*. portion, that muſt be taken to be a ſatisfaction of the 1500 *l*. given her by the will for her portion, and a revocation of the will, *pro tanto*; but as to the 1000 *l*. legacy, *that being a general legacy given by the will*, Mrs. *Lane* muſt have it, notwithſtanding the 4000 *l*. given her for her portion; and the * perſonal eſtate ſhall not go to eaſe the real eſtate of the legacies charged on it by the will. † Poſt, 213. and references. 184

Antè, 12. and references. 2 Vern. 677. S. C.

Decreed likewiſe, that the widow muſt diſtribute the ſurplus; for though the law was taken otherwiſe at the making of the will, yet by ſubſequent reſolutions, the law is declared otherwiſe, and here is no circumſtances intervened to alter the judgment of the court to what the law was taken to be at that time, as the dying of the teſtator at the time of the will.

Antè, 170. *è contrà.*

As to the *hotch-potch*, he could ſee no reaſon againſt it; and therefore the portion muſt be brought in, and the daughters have the benefit of it, but not the wife, and 1500 *l.* coming of the 4000 *l.* coming out of the land, this is only 2500 *l.* to be brought into *hotch-potch*.

Caſe 153. Cook *verſus* Parſons.

3 Lev. 1. 3 Mod. 218. 2 Ch. Caſes, 109. 1 Wms. 740. 2 Wms. 509. 3 Wms. 254. 2 Atk. 176. 2 Vezey, 454.

A will of land wrote by the teſtator, and publiſhed in the preſence of three ſeveral witneſſes, at three ſeveral times, and atteſted by all at the ſaid reſpective times, in the preſence of the teſtator, ſufficient within the Statute of Frauds; but whether the man's owning the writing to be his, in the preſence of the witneſſes, be ſufficient, &c.

THIS was a bill of review to reverſe a decree of my Lord *Nottingham* in 1682, for ſale of lands ſubjected by the will to the payment of debts; the lands were deviſed to truſtees, and their heirs, to ſet and farm let, and out of the rents (without ſaying, and profits) to pay his debts; and all his debts and legacies being firſt paid, he gave the ſurplus to *F. S.*

This will was wrote with the teſtator's own hand, as was proved, and publiſhed in the preſence of three ſeveral witneſſes, at three ſeveral times, and they all atteſted it in his preſence; but he did not ſign it in the preſence of the ſecond witneſs, but only owned the ſigning to be his hand, and deſired him to atteſt the will, as was proved by that witneſs.

The teſtator died, leaving an infant heir, and the land was decreed to be ſold, and no day given the infant to ſhew cauſe againſt it. The objections to the decree were,

185 * 1*ſt*. That this is no good will within the Statute of Frauds and Perjuries, becauſe not atteſted by all the witneſſes at one time, and that one of them did not ſee the teſtator ſign, but only own that it was his hand. 2*dly*. If the will had been well

executed, yet the words of it were not ſufficient to ground a decree for ſale, being only to let and ſet, and out of the rents, without ſaying, and profits, to pay, *&c.* 3*dly*. That though the words had been ſufficient to bear a decree, yet the infant ſhould have had a day given him, to ſhew cauſe when he came of age.

† My Lord Keeper held a publication of a will before three witneſſes, though at three ſeveral times, good within the ſtatute, and thought the writing the will with the teſtator's own hand, a ſufficient ſigning within the ſtatute, though not ſubſcribed nor ſealed by him, but doubted whether *owning the ſubſcription to be his was ſufficient*; but the validity of the will is a queſtion at law, and therefore ordered it to be tried. † Burrows, 1773.

As to the words let and ſet, and out of the rents to pay, he held them not ſufficient whereon to ground a decree for ſale; but the ſubſequent words, that after his debts and legacies paid, it ſhould be to the truſtees, were ſufficient.

There needs no day be given the infant, becauſe the land is deviſed to the truſtees, ſo nothing deſcended to the infant, and there was no decree againſt him to join, and the truſtees might have ſold without coming to the court for direction; and yet if they do come, it may be a queſtion, if the infant heir ought not to have a day to ſhew cauſe; but he thought it not needful in this caſe, becauſe nothing deſcended to him, nor was there any decree againſt him to convey. Eq. abr. 280, pl. 4. S. C. and P. 2 Vern. 429. S. C. and P.

* Baſkerville *verſus* Gore & al'.

186
Caſe 154.

A Treaty of marriage was had between the defendant *Richard Baſkerville*, the plaintiff's eldeſt ſon, and *Jane* his wife, formerly the wife of *Rayner*; and the defendants affirmed ſhe had 2600 *l.* fortune at her own diſpoſal, and thereupon the marriage was agreed on, and articles entered into, whereby it was recited, that the defendant *Jane* had a fortune of 2600 *l.* which was to be paid the plaintiff (without ſaying by whom) and in

A father, in conſideration of 2600 *l.* to be paid him on his ſon's marriage as the wife's portion, articles to ſettle 600 *l.* a year on the marriage; and it being after diſcovered, that

ſhe had only 1600 *l.* the father was decreed to make a ſettlement for the 1600 *l.* only, in proportion to what he was to have made for the 2600 *l.* and not to deduct out of the 600 *l. per ann.* 1000 *l.* worth of land, *viz.* 50 *l. per ann.* as was urged he ſhould; for then, by the ſame reaſon, if ſhe had nothing, it might have been urged, that only 2600 *l.* ſhould have been deducted out of the ſettlement, and he be obliged to ſettle the reſt for nothing.

conſideration thereof, the plaintiff did covenant with the defendant *Gore*, uncle of the defendant *Jane*, that he would, within ſix months after the marriage, on payment of the 2600 *l.* ſettle certain lands in the articles mentioned, and ſaid to be 600 *l. per ann.* value, on the defendant *Richard*, for life, then 250 *l. per ann.* rent-charge to the defendant *Jane* for her jointure, then the whole to the iſſue of that marriage in tail, with the remainder to the right heirs of *Richard*.

The marriage took effect, and after it was diſcovered that 1000 *l.* part of *Jane*'s fortune, was ſettled by her and her former huſband, *Rayner*, in ſuch manner, that it would come to the iſſue of this huſband (all her children by her former huſband being dead); but it could not be paid to the plaintiff, nor could he have any benefit of it: ſo the articles were not performed on either ſide.

The father brought this bill againſt the ſon and his wife, and their infant ſon, and the truſtee in the articles, that the articles might be performed mutually in a ſhort time, or he be diſcharged therefrom, he being willing, on his part, to ſettle on payment of the 2600 *l.*

187 * It appeared by the anſwers, that the 1000 *l.* was ſo ſettled that it could not be paid to the father; but the defendants offered, that the plaintiff ſhould keep 50 *l. per ann.* land, out of the ſettlement, to ſatisfy himſelf that 1000 *l.*

But to that the plaintiff would not ſubmit, and ſaid, it was only paying him out of his own, and might have been with as good reaſon urged, that if no part of the 2600 *l.* would have been had, the plaintiff ſhould have kept 2600 *l.* worth of land out of the ſettlement, and ſo have ſettled the reſt for nothing; for in the one caſe, as well as the other, it might be ſaid, that the plaintiff had 2600 *l.* which was all he contracted to have; but the plaintiff offered, if the 1600 *l.* might be quietly paid him, he would make a ſettlement for that, in proportion to the ſettlement he was to have made for the 2600 *l.* but the defendants did not like this, but inſiſted there ſhould be only 1000 *l.* worth of land kept out of the ſettlement.

The Maſter of the Rolls ſaid, he could not decree him to do more than make a proportionable ſettlement; ſo then the defendants ſaid, they would find ſome way or other to raiſe the money for the plaintiff, and the decree was, that if the defendants did within ſix months pay the 2600 *l.* the Maſter was to ſee the ſettlement made purſuant to the articles, or if 1600 *l.* then a proportionable ſettlement, or elſe the articles to be diſcharged.

Note; By the articles, the ſon was to have had the rents from the next rent day, and the father the intereſt of the portion; but there having been no performance, the Maſter of the Rolls would not decree the plaintiff to account for the rents, and take the portion with intereſt from that time, the father not being obliged by the articles to make any ſettlement till the portion was paid.

188
Caſe 155.

* Darſton *verſus* Earl of Orford & al', executors of Ruſſel, who married Lady North, widow and executrix of Lord North.

1 Eq. abr. 10, pl. 9. S. C. 3 Wms. 401. S. C. (n.) Antè, 79. and references.

After a bill and anſwer put in, the executor voluntarily paid a bond debt, and allowed on the account, be- in reaſon, where

THE Lord *North* had granted a rent charge to the plaintiff, and covenanted for payment of it, and it being greatly in arrear, he died much indebted to ſeveral perſons, both by bond and ſimple contract.

cauſe he might, by confeſſing judgment, have preferred him, and no difference paid without ſuch confeſſing.

The plaintiff brought his bill in this court for a diſcovery of aſſets, and to have ſatisfaction of his debt. After proceſs ſerved, and anſwer put in, *Ruſſel* voluntarily paid a bond to *J. S.* without ſuit: the cauſe proceeded to hearing, and an account was decreed. *Ruſſel* died, and the cauſe was revived againſt his executors only; and the queſtion was, Whether this voluntary payment pending a ſuit here ſhould be allowed them on the account?

For the plaintiff it was inſiſted, that it ſhould not, for when a juſt creditor makes a demand in this court, it is not according to good conſcience not to pay it, and even at law a voluntary payment to a creditor in equal degree is not good, after an action brought by another; and it has been adjudged to be the ſame thing here, particularly in the caſe of † *Joſeph* verſus *Mott*, where payment on a recovery at law, or action brought after a bill was depending here, was diſallowed on the account, after great debate.

† Antè, 79.

On the other ſide it was ſaid, that though a voluntary payment be not good at law, after an action brought by another; yet an executor in that caſe may confeſs judgment to which he pleaſes, and pay with ſafety, which here he cannot, nor have an injunction to ſtay the action at law.

189 * My Lord Keeper thought the payment ought to be allowed; he ſaid it ſeemed to be admitted, that if the executor had confeſſed judgment at law, the payment would have been good; and why ſhould not a voluntary payment, without confeſſing judgment, be as good in equity, for there is no difference in reaſon; and if money be to be laid out in a purchaſe, and ſettled on *A.* in tail, upon a bill brought here, the court will decree the money to be paid to him; becauſe if the purchaſe and ſettlement had been made, he might have diſpoſed of it, though there muſt have been the formality of a recovery or fine, yet being in his power, it is looked upon as the ſame thing; but this is a point of conſequence, let the precedents be ſearched, and I will conſider of it.

Afterwards, 3 *June*, 1702, this cauſe came on again, and ſuch precedents as could be found were produced on both ſides; and my Lord Keeper ſeemed to be of the ſame opinion as formerly, and ſaid it was an intolerable inconvenience, that an executor might be obliged: you cannot oblige a man to take leſs than his debt; and how then can you ſtop him for going on at law to recover it? The caſe of *Joſeph* verſus *Mott* is a precedent againſt me, but I think that is a direct change of the law; but I will conſider of it till to-morrow.

The

The next day he ſaid he had conſidered of the precedents, and was bound by them, and therefore ordered the exception taken by the defendants to the Maſter's report to be overruled, and the payment (being voluntary) to be diſallowed; but he ſeemed to diſapprove of the caſe of *Joſeph* verſus *Mott*, where the judgment at law was fairly obtained. Antè, 79.

Note; Afterwards an appeal was brought in the Houſe of Peers from this decree, and on the 21ſt day of *November*, 1702, the decree was reverſed, and the payment allowed.

*DE

Termino Paſchæ,

1702.

In Curia Cancellariæ.

Caſe 156.

Shepherd *verſus* Kent.

See Melon. Mſs. K. vol. B. p. 24.

2 Vern. 435. S. C. 1 Eq. Caſes abr. 142, pl. 6. S. C.

One deviſes all his real and perſonal eſtate for payment of his debts and legacies, and dies; a creditor obtains judgment againſt the executor; and then he and ſome other creditors, who had not obtained judgments, bring their bill, and had a decree for ſale of the eſtate, and

MR. *Richard Kent* being greatly indebted to ſeveral perſons, borrowed 8000 *l.* of the truſtees of the Earl of *Kildare*, and gave them a note under his hand, that for ſecuring the repayment of that money with intereſt, he would make them a mortgage of an eſtate in *Wiltſhire*, which he then had lately purchaſed of Sir *Edward Hungerford*; but before it was done, Mr. *Kent* died indebted to ſeveral perſons by bond and ſimple contract, having by his will deviſed an annuity of 500 *l.* *per ann.* to his wife, and ſeveral other legacies, and † *deviſed alſo his eſtate, real and perſonal, for payment of his debts and legacies.*

to be paid their debts in proportion. The judgment creditor received ſeveral dividends, after having proved his debt before the Maſter, then petitioned for a rehearing, on pretence that he being a judgment creditor, ought to have a preference before the other creditors, at leaſt out of the perſonal eſtate; but the other creditors having joined in the bill, and contributed to the charges of the ſuit, and ſeveral dividends being made purſuant to the decree, the court would not alter it, and held, that if any preferences were to be, the plaintiff ought to bring what he received into *botch-potch*, and that he ought to take either all law or all equity.

† Vide 1 Wms. 228. 2 Wms. 412.

The

The Earl of *Kildare* and his truſtees brought a bill againſt the executors and two others, who were deviſees, and likewiſe creditors of the teſtator, to have the lands mentioned in the note made a ſecurity for the 8000 *l.* * and on hearing of that cauſe, it 191
was decreed that the eſtate ſhould be ſold, and that out of the purchaſe-money the Earl ſhould be paid in the firſt place, and that then the reſt of the creditors ſhould be paid in a courſe of adminiſtration.

The now plaintiff, and ſeveral others of the plaintiffs, who were no parties to the firſt decree, brought actions at law againſt the executors upon their bonds, and recovered judgment; and afterwards they and ſome others of the plaintiffs, who had obtained no judgments, brought this bill againſt the Earl of *Kildare* and his truſtees, and againſt *Kent*'s executors and others, ſetting forth their debts, and that the executors concealed the aſſets, and pretended to prefer other creditors of an inferior nature, and for that purpoſe pretended that the Earl of *Kildare* had obtained a decree to have his debt (which was ſecured only by a note) paid him before them, which, if it were ſo, was obtained by colluſion, and would not have been ſo decreed, in caſe a proper defence had been made; and they being no parties to that ſuit, ought not to be bound by it, but that it ought to be ſet aſide.

The cauſe came to a hearing, and the court declared they ſaw no reaſon to alter the Earl of *Kildare*'s decree, ſo as againſt him. The bill was diſmiſſed.

Then the decree went on farther, and ſaid, that all the eſtate of Mr. *Kent* ſhould be ſold, and the money brought before the Maſter, and the creditors ſhould go before the Maſter and prove their debts; and after payment of the Earl of *Kildare*, the ſurplus to be divided amongſt the reſt of the creditors proportionably; and the plaintiff *Shepherd*, and the others, who had obtained judgments, went before the Maſter and proved their debts, and as the money was brought before the Maſter, received ſeveral dividends of the money ariſing by ſale of the real eſtate.

There

There being a conſiderable ſum before the Maſter, which
192 was raiſed by ſale of the perſonal eſtate, *Shepherd* * and the other creditors, who had obtained judgments, petitioned for a rehearing of the cauſe, for that the decree ought to have given them a preference before thoſe creditors who had not obtained judgments, at leaſt out of the perſonal eſtate, and ſo had the decree done that was at firſt made, on hearing of the Earl of *Kildare*'s cauſe, by ſaying, *That after he was ſatisfied, the other creditors ſhould be paid in a courſe of adminiſtration.*

The other creditors, who had no judgments, oppoſed altering the decree, and ſaid, the plaintiff and the other judgment creditors ought to take all law or all equity; and now they had brought them in here by this bill, and made them contribute to the charges of this ſuit, and had received dividends under the decree, they ought not to alter it on a rehearing to prefer themſelves; and that a judgment obtained after the firſt decree ought not to avail them; beſides, if the plaintiffs would have advantage of their legal preference, they ought to bring all they had received by virtue of their judgments into *hotch-potch.*

It was replied, that they having a legal preference by their judgments againſt the executors, and their bill being only to give them a preference before the Earl of *Kildare*'s note, which was not allowed, they ought to have been diſmiſſed generally; and their receiving their ſhares before the Maſter of the equitable aſſets, where they had no preference, ought not to prejudice them as to the perſonal aſſets, where they have a preference; and there can be no pretence for their bringing any thing into *hotch-potch.* A man indebted by bond deviſes his real eſtate for payment of his debts, a creditor recovers judgment againſt his executor, but the real and perſonal aſſets will not pay all the debts, ſhall not his judgment entitle him to the perſonal aſſets? And ſhall he not come in for his proportion alſo of the equitable aſſets, for what remains unpaid? Or if one has both a
193 bond and a mortgage for his debt, and one * is worth nothing, ſhall not he make up the inconveniency of the one by the other, and foreclоſe, if not paid?

Lord

Lord Keeper. This point is not now before me, and if it were, I think, if they would have any benefit of the equitable aſſets, they ought to bring what they had received into *hotch-potch*. As to the decree, I am of opinion it is juſt, and will not alter it; when you, who are a judgment creditor, bring a bill with others, and pray a ſatisfaction of your debts, and relief, I think you ought not afterwards (when you have made them contribute to the charge) to make uſe of any legal preference.

Tovey *verſus* Young.

Caſe 157.
4 *May.*

2 Vern. 437. S. C. Poſt, 261. 1 Eq. abr. 378, pl. 7. S. C. 2 Atk. 319. 378.

A Factor buys cheeſe for his principal, and then breaks, and an action is brought againſt the principal, and a recovery at law; the plaintiff here endeavoured in the court of law to have got a new trial, but was denied it.

Verdicts being recovered in *Suffolk*, by the factors againſt the *London* cheeſemongers, they brought their bill for a new trial in an indifferent county, but the bill was diſmiſſed.

And now this bill was brought, and ſuggeſted for equity, that before the cheeſe was bought, he had countermanded the authority of the factor, and that the defendant had notice of it (but that was denied by the anſwer, and not proved).

Another ſuggeſtion was, that there could not be an indifferent trial in *Suffolk*, for that almoſt all the freeholders there were concerned in intereſt, and had declared they never would find againſt their countrymen.

The plaintiff likewiſe found out ſince the trial, that the principal witneſs, on whoſe teſtimony the recovery was had, was partner with the inſolvent factor, and cited the caſe of ‡ *Hennell* and *Graham* verſus *Kelland*, 11 *February*, 28 *Car.* 2. where an action was brought againſt an adminiſtrator, who pleaded *plene adminiſtravit*; and the trial was brought down by proviſo; and at the trial the defendant being put to prove a ſum of 50 *l.* paid * before the plaintiff's original, which not being provided to do, a verdict was againſt him; yet after finding the note, whereby his witneſs was enabled to ſwear that matter, on a bill brought

‡ 1 Eq. abr. 377, pl. 2. S. C.

brought here, a new trial was granted; and *Humphreys* verſus Sir *Robert Payton*, 11 *November*, 15 *Car.* 2. where a recovery in a trial at bar was ſet aſide, on new matter diſcovered, and affirmed on rehearing, 2 *May*; *Ives* verſus *Hankey*, 8 *December*, 3 *Jac.* 2. of a *Cheſhire* factor, alledging, he ſold to him as a merchant, and not as a factor; and † *Tilley verſus Wharton*, firſt heard here, and after in the Houſe of Lords, where a new trial was granted after a trial at bar.

† Vern. 378. 419. S. C. Eq. abr. 378, pl. 4. S. C. 2 Vern. 68.

Lord Keeper. Bills for new trials ought to be reduced to ſome certainty; the grounds for relief were uſually partiality in the jurors, § *or new diſcoveries*; as to the 1ſt, the trial is to be by a jury *de Vicineto*; but if cauſe, the *venue* may be changed to another place, challenges may be allowed, or an attaint granted, and theſe are to be at law; and the court where the cauſe is tried, may, if they ſee cauſe, grant a new trial, which here you have attempted, but could not prevail, and I cannot grant a new trial for partiality; new matter may in ſome caſes be ground for relief; but it muſt not be what was tried before: nor when it conſiſts in ſwearing only, will I ever grant a new trial, unleſs it appears by deed or writing, or that a witneſs, on whoſe teſtimony the verdict was given, were convict of perjury, or the jury attainted; and it does not appear the witneſs and plaintiff at law were partners; and if the jury had declared they would find for the plaintiff, the court at common law would have taken order in it. The caſe of *Hennell* and *Graham* verſus *Kelland* was matter in writing; and in the caſe of *Humphreys* verſus *Payton*, it does not appear what the new matter was. *Ives* verſus *Hankey* was tried in *Nottinghamſhire*, and not in *Cheſhire*, and went without defence; yet a new trial was denied at law, but granted here, becauſe the right had never been tried; but that was not for partiality. *Tilley* verſus *Wharton* * differs much. *Tilley*'s bill was diſmiſſed, and *Wharton*'s croſs bill came on, and a ſatisfaction of the bond decreed out of the truſt eſtate that was altered above, and another trial granted, and that went a contrary way; and controverſies this way will never have an end.

§ 2 Vezey, 553.

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Note; This was firſt heard at the Rolls, and diſmiſſed; and now that decree confirmed on appeal.

Brewin

Brewin *verſus* Brewin.

Caſe 158.
May 13.

Antè, 109. 122. Poſt, 213. 290. 1 Eq. abr. 267, pl. 2. S. C. 1 Atk. 356. S. C. cited by Lord *H.*, who obſerves, it is exactly right, as here reported. Brown's Rep. 194. S. C. cited.

A Man by his marriage ſettlement creates a term for a raiſing 3000 *l.* for a daughter and daughters of that marriage, to be equally divided between them, if more than one, and to be paid within a year after his and his wife's death.

A term is created by marriage ſettlement to raiſe 3000 *l.* for daughters portions, within twelve months after the death of the ſurvivor of the huſband and wife, there being one daughter; the father deviſes the truſt lands to make good his wife's jointure, and to raiſe 3000 *l.* for his daughter's portion: the daughter ſhall not have two portions of 3000 *l.* and ſhe dying at the age of five years, and the portion to be raiſed out of land, it ſhall not be raiſed for her adminiſtrator, but the intereſt or maintenance the child was entitled to ſhall.

Then he by will (having one daughter, his only child and heir) deviſes the inheritance of ſeveral lands to his wife, to make up her jointure 300 *l. per ann.* and for raiſing 3000 *l.* for his daughter's portion, without limiting any time of payment, and deviſes the ſaid lands ſo charged by the ſettlement with the 3000 *l.* to his brother.

The daughter brought a bill againſt the deviſee of the lands, to have the 3000 *l.* or foreclosure, but died †, pending the ſuit, about five years of age.

Her mother adminiſters and revives the ſuit, and inſiſted on the caſe of the † Earl of *Rivers* verſus *Derby*; and that there was no proviſion for maintenance for the daughter, till the portion became payable, and therefore it was payable preſently.

† 1 Eq. abr. 268, pl. 7. S. C. 2 Vern. 72. S. C.

The defendant alledged by his counſel, that if the caſe reſted on the deed alone, the plaintiff could have no right, and the will does not mend it; the 3000 *l.* * by that is the ſame as the 3000 *l.* by the deed, for they do not demand two 3000 *l.* and then it muſt ſtand on the deed.

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As to the time of payment, the will having appointed no time at all; but taking it in the moſt favourable ſenſe for the infant, it can be conſtrued (being a portion) payable only when ſhe wanted a portion, which could not be at five years old; and this caſe is upon the reaſon of all the caſes of *debitum in preſenti ſolvendum in futuro*, and ſo within the rule of *Pawlet* verſus

† It is obſerved in Eq. abr. that the daughter died within the year.

Pawlet,

Pawlet, 2 *Vent.* and the will was only to better the fund, the ſettlement being defective in value, and is plainly not ſubſtantive, but relative to the deed; and if it were, it would be againſt them, for being a portion and out of lands, it would ſink for the benefit of the heir; and the diſtinction between a deed and a will has been exploded even in that caſe.

Lord Keeper. If it had been a perſonal legacy, it muſt have been paid, and that preſently, though the child dies before the appointed day, or as a deviſe out of land by the will, though no time of payment limited; but here the will is relative to the ſettlement, and both make but one ſecurity; and by the will the portion ſhould have been raiſed in a reaſonable time, when the child came to want it, but not preſently, though ſhe ſhould have had reaſonable maintenance. In the mean time it is within the rule of all the former caſes. In caſe of a perſonal legacy, payable at 21, or marriage, I think the court always appointed maintenance out of the intereſt of it, but not if expreſsly limited otherwiſe in the mean time. And the bill was diſmiſſed by the Maſter of the Rolls, and affirmed on appeal; but the land was charged with 100 marks *per ann.* maintenance for the child whilſt it lived.

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Caſe 159.

* Kent *verſus* Kent.

1 Wms. 263. (n.) 1 Eq. abr. 2. 3 Atk. 691. Treatiſe on Pleadings in Chancery, 32.

After a decree to account and abatement of the ſuit by the defendant's death, his repreſentative may revive.

ON a motion this day made, and debate of the matter, it was held by the Lord Keeper, that where a decree is for an account, and then the cauſe abates by the defendant's death, his repreſentative may revive as well as the plaintiff, both being in nature of plaintiffs.

* D E

Termino S. Trinitatis,

1702.

In Curia Cancellariæ.

Bateman *verſus* Bateman.

Caſe 160.

1 Eq. abr. 149, pl. 6. S. C. Vide 2 Atk. 430.

Whether equity can give relief on the ſtatute againſt fraudulent deviſes being introductive of a new law.

A Man binds himſelf and his heirs, and dies, leaving a real eſtate to deſcend to his heir, ſubject to a mortgage for years; the heir aliens the real eſtate before a bill brought; and if the obligee was relievable here againſt the heir, and purchaſer, on the ſtatute for preventing fraudulent deviſes, or if he was to be ſent to law to get judgment firſt, was the queſtion.

My Lord Keeper thought, that ſtatute being introductive of a new law, the relief on it muſt be at law, and held likewiſe, that a bond creditor could not redeem a mortgage for years, without firſt having judgment at law againſt the heir, though it might have been otherwiſe in caſe of a mortgage in fee.

Note; *Chancey al cet jour done relief ſur dit ſtat. en tiel caſe.*

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Caſe 161.

* Ive *verſus* Aſh.

2 Eq. abr. 242, c. 8. S. C. 1 Vern. 98, 99. Caſes temp. Talb. 104. 141 †. 3 Wms. 393 †. Brown's Rep. 125 †.

The ſtatute of *Ed.* 6. does not extend to military offices; and the 7 *W.* & *M.* only to horſe, foot, and dragoons.

THE defendant being a captain of marines, agrees with the plaintiff to ſell it him for 600 *l.* to be paid ſuch a day agreed on between them, and the defendant agrees to procure a commiſſion to be ſigned by the king for the plaintiff by that day, to be captain in the ſaid regiment; and the plaintiff gave a bond for performance of the agreement, and a warrant of attorney to confeſs judgment, which after was entered up.

The defendant quitted his employment, and gets the commiſſion ſigned by the time, and it was left in the Secretary's office, and the plaintiff had notice of it; but he being deſirous to go off from his bargain, would not take it out; and ſo the captain's place was given to another.

The plaintiff being proſecuted at law, on the judgment, brought this bill, and now inſiſted, that by the ſtatute of *Edw.* 6. againſt ſelling offices, the bargain was void, at leaſt by the 7th of *W.* and *M.* which enacts, That every commiſſion officer, before his commiſſion is regiſtered, ſhould take the oath there mentioned; that he had not directly or indirectly given any thing for procuring the commiſſion, but the uſual fees, which the plaintiff could not do; and therefore as to him it was *nudum pactum*, and an undertaking to procure a commiſſion for him muſt be intended, ſuch a one as he might have benefit by, which here without perjury he could not; and the defendant being an officer, knew of this law, though the plaintiff did not, and ſo it was a perfect ſurprize upon him, and he having no benefit by it, ought to pay nothing for it.

On the other ſide it was ſaid, and the court was clearly of the ſame opinion, that this is not within the ſtatute of *Edw.* 6. and as to the other ſtatute, it extendeth only to horſe, foot, and dragoons, not to the * marines; and if it did, yet it did not prohibit ſelling, but only provides, that the officer ſhall take the

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† Theſe are caſes reſpecting the ſtat. 5 and 6 *Edw.* 6. in which relief was granted. In the laſt caſe a perpetual injunction was granted upon the public policy of the law, although the office was not within the ſtatute.

oath,

oath, and the defendant has loſt the employment, and done all that by the agreement he was obliged to do. Suppoſe the plaintiff had been obliged to take any other oath, and would not have taken it, muſt the defendant have loſt his money and place? And therefore the court held, that he muſt pay the money; and his Lordſhip likened it to a bond, *pro enſia mento & favore*, which if reduced to a judgment, it is not avoidable at law, nor ever relieved here; and the plaintiff was decreed to pay the principal, intereſt, and coſts at law, but not here.

This decree was affirmed on appeal to the Houſe of Lords, and on enquiry of officers, the marines were not looked upon to be within the ſtatute of 7th of *Will.* and *Mary*, nor required to take the oath.

Crowther *verſus* Crawley. Caſe 162.

1 Strange, 415. 508. 2 Strange, 910. 1175. 1195. 1248.

A Man takes a goldſmith's bill from his debtor, when he might be paid money; afterwards, and before the bill could be received (without any default or neglect of him that took it) the goldſmith fails; he that took the bill ſhall bear the loſs; and the Lord Keeper thought it ought to be ſo always on a general taking, unleſs the party who gives the bill warrants it for a certain time, for then it is his hazard during that time.

A. takes a goldſmith's note from *B.* who was his debtor, when he might have been paid ready money. The goldſmith fails before the money could be received, *A.* ſhall bear the loſs, though no neglect in him.

Case 163. Eales *verſus* England.

Antè, 71. 1 Vern. 411. 2 Vern. 466. S. C. 9 Mod. 122. Fitzgibbon, 315. 1 Eq. abr. 297, pl. 3. S. C. 2 Eq. abr. 291, c. 9. 8 Vin. 70 to 72. 1 Atk. 469. 1 Vezey, 107. See alſo, 2 Vern. 116. 163. 10 Mod. 404. Salk. 236. Brown's Parl. Caſes, 400. 545. 6 vol. ib. 36. Brown's Rep. 142. 179, 180, 489. 1 Burn's Ec. Law. (tit. Biſhops) †.

A. deviſes 300*l.* to *B.* which he wills him to give *C.* his daughter, at his death, or ſooner, if there be occaſion, for her better preferment. *B.* dies before the teſtator; but *C.* ſurvived, and died at the age of 16 years: this is not a lapſed legacy, but ſhall go to the repreſentative of *C.*, *B.* being only in the nature of a truſtee.

E Lizabeth Heydon made her will, and deviſes in theſe words; *I give to* B. 300*l. one* 100*l. whereof he owes me by bond, which I intended to have given his daughter* C. *but my will is, that he give the ſaid* 300*l.* * *to* C. *at his death, or ſooner, if there be occaſion, for her better preferment*, and makes the defendant executor.

B. dies

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† To the above references may be added the following authorities.

Bland v. *Bland*, MSS. in *Can.* 24 *Feb.* 1745, Reg. Lib. fol. 319. A. 1745.—Dame *Ann Bland* having lands ſubject to an equitable charge of 4000*l.* and to a mortgage of 4000*l.* executed by herſelf, deviſed to her ſon Sir *John Bland*, his heirs, executors, adminiſtrators, and aſſigns, all her manor of *Withington*, and other real and perſonal eſtate whatſoever, adding the following clauſe: "And it is *my earneſt requeſt* to my ſon, in caſe of failure of iſſue of his body, that my ſon would, in his life-time, ſettle the ſaid eſtate, *or ſo much thereof as he ſhould ſtand ſeiſed of at his death*, that the ſame may come to and be enjoyed by my daughter and the heirs of her body, and in failure of iſſue, with divers remainders over, and made her ſon executor. It was held by Lord *Hardwicke* to be no truſt, inaſmuch as the words, *ſo much as he ſhould die ſeiſed of*, gave him the abſolute ownerſhip, and the other expreſſions amounted to nothing more than words of *recommendation*, leaving it to the diſcretion of the party whether he would comply with her requeſt or not.

Cunliffe v. *Cunliffe*, *Can.* MSS. Eaſter Term, 7th *May*, 1770, *Coràm* Lords Commiſſioners *Aſton* and *Smith*, Reg. Lib. fol. 439. A. 1769.——The teſtator, Sir *E. Cunliffe*, deviſed certain ſugar-houſes and ſtock in trade unto his ſon Sir *E. Cunliffe*, the plaintiff's brother: nevertheleſs, in caſe Sir *E.* ſhould die without a ſon, *he recommended* it to him to give and deviſe the ſaid premiſſes unto the plaintiff Sir *R. Cunliffe*. It was held, that the word *recommend* was not ſufficient to raiſe a truſt in favour of the plaintiff.

Le Maitre v. *Banniſter*, in *Can.* MSS. 26 *November*, 1770.——The teſtatrix gave her fortune to Captain *Reach*, and if he ſhould die without iſſue, ſhe *recommended it to him* to do juſtice to *A.* and her children, if he ſhould think them worthy of it; but if any unforeſeen accident ſhould make the whole, or any part, acceptable or ſerviceable to him, he might diſpoſe of it, if he ſhould think fit. It was held to be no truſt.

Pierſon v. *Garnet*, at the *Rolls*, MSS. *March* 6th, 1786.——*John Garnet*, late Biſhop of *Clogher*, by his will, dated 12th *October*, 1780, gave his perſonal property to *Samuel Salt*, Eſq; in truſt to pay ſeveral annuities, and then proceeded as follows:—"And ſubject to the ſaid annuities, it is my will, that the ſaid *S. Salt*, his executors, &c. ſhall and do pay, or permit and ſuffer my kinſman *P. Pierſon* to receive the whole of the reſidue of the proceeds, intereſt, and profits of the ſaid fund, ſo to be placed out at intereſt, after the payment of the ſaid annuities, for and during the term of his natural life, with the full benefit of the ſaid annuities, if they, or any of them, ſhall ceaſe during his life; and from and after the death of the ſaid annuitants, I bequeath the ſaid reſidue to the ſaid *P. Pierſon*, his executors, adminiſtrators, and aſſigns; *and it is my dying requeſt to the ſaid P. Pierſon, that if he ſhall die without* leaving

In 1 Ver. Junr 6 l. this note of Pierson v. Garnet is explained by W. Finch when been corrected by Lord Kenyon &c

B. dies before the teſtatrix, and *C.* ſurvived the teſtatrix; but died about the age of 16 years, and the plaintiff takes adminiſtration to her; and the queſtion was, Whether this be not a void legacy, *B.* dying before the teſtatrix?

It

leaving iſſue living at his death, that the ſaid P. Pierſon do diſpoſe of what fortune he ſhall receive under this my will to and among the deſcendants of my late aunt Ann Coppinger, his grandmother, in ſuch manner and proportions as he ſhall think proper."—The bill was filed by *P. Pierſon*, the reſiduary legatee, againſt the ſeveral deſcendants of *Ann Coppinger*, and other neceſſary parties, praying the uſual account, that the right of the plaintiff to the reſidue of the teſtator's fortune might be declared and eſtabliſhed, and other neceſſary directions. Four queſtions aroſe at the hearing, three of which did not reſpect the preſent point. The firſt queſtion was, Whether the words uſed in the recited clauſe were recommendatory only, or imperative, ſo as to raiſe a truſt in favour of the deſcendants of *Ann Coppinger*?

Maſter of the Rolls, after ſtating the material clauſe in the will, and the ſeveral queſtions, decreed as follows, in reſpect of the preſent point:—" With regard to the firſt and moſt material queſtion, if it is one of thoſe duties of imperfect obligation only (as the Civilians term them) which bind the moral character of man, but in which this court cannot interfere, it will not entitle me to do ſo in the preſent caſe, who cannot go beyond thoſe rules which have bound courts of juſtice: it is better to adhere to thoſe principles upon which others have decided, than to vary from them, by ſpelling out little circumſtances in a caſe as the ground of determination. The principles appear to be theſe, as recognized by Lord *Thurlow*, in the authorities of *Harland* v. *Trigg*, and *Wynn* v. *Hawkins*, '*that where the property is certain, and the objects to whom it is given are certain, there a truſt is to be created*;' and it would be a lamentable circumſtance if this court was to raiſe diſtinctions upon ſuch ſlight words as *peto*, *rogo*, *fidei tuæ committo*, and ſuch expreſſions of the civil law: if deciſions of caſes were to turn upon ſuch grounds, property would be without any rule whatſoever. The principles were not firſt laid down by Lord *Thurlow*, but extracted by him with great wiſdom from the deciſions of his predeceſſors upon points of this nature. I wiſh to refer to a caſe which I have not heard cited, *Richardſon* v. *Chapman*, which was firſt heard before Lord *Northington*, and afterwards in the Houſe of Lords; it is accurately ſtated in 1 Burn's Eccleſiaſtical Law (tit. Biſhop): that caſe aſſerts, that in this court a requeſt in a will is at this day imperative, but *there muſt be* a particular object named or pointed out with certainty. It may be right to examine whether theſe principles have been ſupported or impugned by former deciſions, and how theſe caſes came to be ſo decided. As to the general rule, it may be ſufficient to refer to *Harland* v. *Trigg*, and *Wynn* v. *Hawkins*. As to the other authorities which have been cited, there is one which takes a diſtinction very appoſite to the point in queſtion; it is 2 Eq. abr. 291. *Palmer* v. *Scrib* (8 Viner, 289.) Though this book is not a book of the firſt authority, yet the caſe contains ſo much good ſenſe, as induces me to rely upon it, in conjunction with the other authorities, and conforms to the opinion I have formed in the preſent caſe. As to *Bland* v. *Bland*, that caſe falls within the rule, *the property was not certain*, being the whole of what the deviſee ſhould be ſeiſed of at his death; it was leaving the party an abſolute controul over it during his life; one of the branches neceſſary to create a truſt was manifeſtly wanting. As to *Cunliffe* v. *Cunliffe*, that the deciſion of that caſe breaks in upon my opinion, I readily admit: I cannot diſtinguiſh that caſe from the preſent, and the decree I ſhall pronounce is in direct contradiction to it. It is abſurd to lay a ſtreſs upon the word *recommend*, in the one caſe, and not upon 'it is my dying requeſt,' in the other; to ſay that one expreſſion ſhall create a truſt, and the other not, when they are equally ſtrong. The ground upon which I get rid of that caſe is, that the Lords Commiſſioners, in delivering their opinions, reſted upon *Bland* v. *Bland*, and *Pynſent* v. *Pynſent* (which is not to be found): that caſe of *Cunliffe* v. *Cunliffe* was not like *Bland* v. *Bland*; certainty of the property, a main circumſtance, was wanting in *Bland* v. *Bland*, and therefore it was erroneous to adopt it in *Cunliffe* v. *Cunliffe*. *Glynn* v. *Harding* is preciſely in point: the reaſons are not fully reported by Atkyns, but the words were *I deſire*, and they were held imperative. Therefore, where theſe two circumſtances concur, the certainty of the property, and the certainty of the object to whom it is given, all the caſes, uniformly

It was ſaid for the plaintiff, that *C.* was in nature of *Ceſtuique Truſt*, and therefore the legacy not loſt by the death of the truſtee before the teſtatrix, and ſhe could not mean any benefit to *B.* becauſe if a match had offered he would have been compellable to pay it before his death.

On the other ſide it was ſaid, the gift was to *B.* and the truſt for *C.* only for particular occaſions, which by her death are at an end. Suppoſe *B.* had ſurvived the teſtatrix and *C.* could her executor have taken it from him? The caſe of Lord *Kennet* verſus Duke of *Bedford*, was the ſame caſe of a real eſtate, that the deviſee ſhould at his death deviſe the lands to the Lord *Goring*, and *per* Lord *Nottingham* decreed only a recommendation, not a truſt.

For the plaintiff it was farther urged, that the queſtion here was only between the adminiſtrator of *C.* and the executor of *Elizabeth*; ſuppoſe the uſe had been given to *B.* for life, and after to *C.* though *B.* had died before *Elizabeth*, yet *C.* would have had it preſently, and the deſire is abſolute to give *C.* at his death. A man gives 200 *l.* to the mother, willing her to deviſe it over to the daughter, it was decreed at the Rolls it ſhould go to the repreſentatives of the daughter, and that decree was affirmed by my Lord *Somers*.

The Maſter of the Rolls ſaid, there is in the will a deviſe of all the reſt and reſidue not before deviſed, therefore this cannot go back to the executrix as a lapſed legacy; but is, as if it

determined, except *Cunliffe* v. *Cunliffe*, which cannot be relied on for the reaſons mentioned, warrant me to pronounce that it is a truſt. As to *Le Maitre* v. *Banniſter*, the words were 'to do juſtice to *A.* and her children;' but if any circumſtance ſhould make it neceſſary, the deviſee was to be at liberty to diſpoſe of it: one of the circumſtances was wanting, for the deviſee had the ſole power over it during life.

"With reſpect to the difficulty and impracticability of carrying this truſt into execution, that argument has no weight with me. Suppoſing an expreſs truſt had been inſerted in the will in favour of the deſcendants, it muſt have been executed, though it would have been attended with all the trouble and impracticability, as urged in this caſe: however arduous the truſt, this court is bound to execute it, *as well as it can*. The argument, that being once given, it cannot be given again, in analogy to the rule, that a fee cannot be mounted upon a fee, is begging the queſtion, for words creating a fee have, in innumerable inſtances, been cut down by ſubſequent words to an inferior eſtate. I think no ſtreſs can be laid upon the words executors, adminiſtrators, and aſſigns; it would be equally reaſonable to lay a ſtreſs upon the eſtate for life in the preceding clauſe.

"Theſe reaſons, and the authorities, operate ſo ſtrongly upon my mind, as to induce me to pronounce, that the words are imperative, ſo as to create a truſt in favour of the deſcendants of *Ann Coppinger*."

were

were given to *B.* for life, then to *C.* then it would certainly have gone over, and *C.* might have had a bill for it in his life, if there had * been occaſion, and he had ſurvived *Elizabeth*; and *words of recommendation and deſire in a will, are always expounded a deviſe*, and here *B.* is but a truſtee, which will not prejudice *Ceſtuique Truſt:* if the truſtee die without heir, the lord by eſcheat will have the land at law, yet ſubject to the truſt here; therefore he decreed it for the plaintiff. 202

ſee Burgeſs v. Wheat in 1. Blackſt. Rep. Ludoe.

Rook *verſus* Rook. Caſe 164.

2 Vent. 285. 1 Freeman, 519. S. C. 1 Eq. abr. 210, pl. 17. S. C. 1 Eq. abr. 210, pl. 16. 1 Lev. 212. Cro. El. 159. 2 Vern. 461. S. C. 560. 633. 3 Wms. 56. 3 Atk. 486. 1 Vez. 11. 1 Brown's Parl. Caſes, 108. Cowper, 808.—*è contrà*, 3 Mod. 228. 8 Vin. 294, pl. 7. 2 Burrows, 912.

ONE deviſes *Black Acre* and *White Acre* to *A.* and after by the ſame will deviſes to *B.* his executor, *all his lands not before particularly diſpoſed of*, to be ſold for payment of debts; and the only queſtion was, Whether this would paſs the reverſion of *Black Acre* and *White Acre?*

A. ſeiſed in fee, deviſes *Black Acre* to *B.* for life, and deviſes to *C. all his lands* not before deviſed, to be ſold for payment of debts; by this deviſe of *all his lands*, &c. the reverſion of *Black Acre* paſſes to *C.*

It was argued, that it ſhall not, becauſe all the land, not before particularly diſpoſed of, is excluſive of the lands before deviſed, though the whole eſtate in them is not deviſed, and that an heir is not to be diſinherited on doubtful words.

On the other ſide it was ſaid, theſe words were only meant to have ſuch eſtates as had been before deviſed, not to exclude the remainder of them from paſſing, for which was cited † *Allen* 28. *Hely* verſus *Hely*, 3 *Mod.* 228. and the teſtator had no other lands left to deviſe but the ſaid reverſion.

† Vide 3 Wms. 63. (n.)

My Lord Keeper was clear the reverſion paſſed; and on advice with all the judges of *C. B.* they all held ſo too, on a caſe ſtated to them for their opinion.

203
Caſe 165.

* Mrs. Aſh's Caſe.

Eq. abr. 278, 6. S. C.

If one marries a lunatic, who is under the care of the committee of the court; this is a contempt, for which the perſon marrying may be committed, and marriage is no *ſuperſedeas* of the commitment, ſo as to take him or her out of the cuſtody of the committee.

MRS. *Aſh* was committed as a lunatic, and whilſt ſhe was under commitment, was forcibly taken away by Mr. *Parker*, and married to him (for which contempt to the court he was committed) and the marriage controverted in the Spiritual Court, and ſhe was now brought into court to be inſpected; and on her inſpection, my Lord Keeper was of opinion ſhe was in her right mind; and the queſtion was, Whether ſhe ſhould be diſcharged of the commitment, and left to her huſband; or if ſhe were to be continued under commitment, if her huſband *Parker* ſhould be the committee?

Sir *Thomas Powis* ſaid, ſeveral married women have been committed, and cited one *Grono*'s caſe in 1698; he married, and after was committed to his ſiſter, and on a proſecution the marriage declared void in the Spiritual Court; for marriage, though it were an undoubted one (which this is not) does not take her out of the committee's cuſtody; and there is no caſe makes any diverſity between a married woman and another; for the huſband himſelf hath not the commitment as huſband, when he is committee.

Sir *John Hollis* cited *Clark*'s caſe, where the marriage was diſowned; and *Emerton*'s caſe, where, on trial before the Lord *Hales* concerning her marriage, the woman was ſequeſtered, but *Windham* was againſt it; and in *Bicknal*'s caſe the woman was left at liberty. Mr. *Fane*'s wife was at firſt committed to a ſtranger, and after to her huſband.

Lord Keeper. Though ſhe is not out of order now, ſhe may be again; the commitment is *regium munus*, not a prerogative,
204 but a duty; and the marriage, though * good, is no *ſuperſedeas* to it, as was held in *Fane*'s caſe, but is controverted; but I think

think ſhe ought not to go back again to the ſame commitment, though I will not now diſcharge her from it; ſuppoſe ſhe did contract when mad, and agreed and conſummated when ſober, it would be good.

Sir *John Cook* being aſked, if he had known the party ſequeſtered, where the marriage was conſummated, anſwered, Yes, often, how elſe ſhall the marriage be controverted?

DE

Termino S. Mich.

1702.

In Curia Cancellariæ.

Caſe 166.

Henriques *verſus* Franchiſe.

2 Eq. abr. 740, c. 2. S. C.

THE defendant had ſtock in his name in the *Eaſt-India* company, in truſt for the plaintiff, and a bond in his own name from the company, but in truſt for the plaintiff; and the plaintiff being beyond ſeas, drew a bill on the defendant, and promiſed to ſend him in effects wherewith to pay it.

The defendant accepts the bill, and after, but before the day of payment, the plaintiff fails, and afterwards the defendant ſells the ſtock and bond (at great diſcount) at the then current price, to enable him to anſwer the ſaid bill. Two years after, the plaintiff comes to him to ſell and reimburſe himſelf; the ſtock and bond roſe in value, and now on a bill brought for an account, the queſtion was, If the defendant ſhould account according to the value he ſold them at, or according to the then current value?

Per Cur. The want of effects was ſufficient to juſtify the ſale without orders, for ſo much as was neceſſary to pay the bill; but the ſtock alone appearing ſufficient for that purpoſe without

without the bond, the defendant muſt anſwer the value of that, as it was when * the plaintiff gave directions for the ſale, and decreed accordingly. 206

Wood & Ux' *verſus* Fenwick & Ux'. Caſe 167.

Eq. abr. 170, pl. 2. S. C. 2 Wms. 204.

One being poor drawn in to ſell an eſtate *at a great under value*; yet, if no *fraud*, cannot be relieved.

THE plaintiff *Wood*'s wife, as heir to her brother, had an inn in *Newcaſtle* deſcended to her, which was let at 69 *l. per ann.* but was ſubject to a mortgage. The plaintiffs being poor, *were inveigled to ſell this inn*, and all their intereſt therein, to the defendant *Fenwick*, for 80 *l.* and after brought a bill for relief againſt the mortgage, and all other his debts; and at the end of the bill pray relief on the whole matter, and the adminiſtrator was made a defendant.

On hearing of the cauſe, my Lord Keeper was of opinion, *that though the purchaſe was not a fair bargain, yet no ſuch fraud appeared as to ſet it aſide.*

Then the plaintiffs inſiſted, that if the court would not ſet aſide the conveyance, yet they had a right to have the perſonal eſtate applied to exonerate the mortgage, which they had not ſold to the defendant, nor received any conſideration for it; and therefore having the adminiſtrator, and all proper parties before the court, were proper to aſk a decree to have ſo much out of the perſonal eſtate, as would have exonerated the mortgage.

My Lord Keeper ſaid, he thought the bill not proper for that purpoſe; but declared, if it had, he ſhould not have extended that matter ſo far; for that the equity that an heir has in ſuch a caſe, is only for the ſake of the real eſtate deſcended to him, that that may be clear to the family; and here the heir having parted with the real eſtate, has no right to the perſonal eſtate, which he might have demanded to exonerate his real eſtate, in caſe he had kept it; ſo the bill was diſmiſſed.

Jeſſon

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Case 168.

* Jeſſon *verſus* Eſſington †,

2 Eq. abr. 321, c. 9. S. C. Poſt, 251.—*è contrà*, 2 Vern. 512. 638. 1 Wms. 425. 2 Wms. 420. 3 Atk. 370.

By a deviſe of all rings and houſehold goods, plate uſed in the houſe does not paſs.

IN this caſe, my Lord Keeper was of opinion, that by a deviſe of all rings and houſehold goods, plate uſed in the houſe did not paſs.

Another point debated was, if a freeman of *London* dies, leaving ſeveral orphans, and any of them die under age, whether his part is by the cuſtom to go to the ſurvivor.

Vernon for the plaintiff argued, that it did by the cuſtom go to the ſurvivor, and had known a caſe where one married an orphan, and made a ſettlement on her, and ſhe after died under age, her fortune went to her ſurviving brothers and ſiſters, and her huſband could not have it; it was admitted by the court and counſel, that the father's will in this caſe (which gave it to the ſurvivors) did operate nothing, becauſe they did not claim under him, but by the cuſtom paramount the will; though a caſe was cited *temp. Eliz.* where it was held, that the father may deviſe the orphanage part of a child, if he die within age, ſo that it be not to the prejudice of another orphan.

Caſes temp. Talb. 132. S. C. cited. 3 Wms. 318. (n.)

Afterwards 5th, 1702, the recorder certified the cuſtom to be, that if the orphan ſon dies before 21, his ſhare ſurvives;

† *Kelly* v. *Pawlett*, MSS. at the Rolls, 11th *July*, 1763. Reg. Lib. fol. 529. A. 1762.

The late Ducheſs of *Bolton* deviſed *(inter al')* all her *houſehold furniture* to the defendant: the plaintiff was appointed her executor and reſiduary legatee. She was poſſeſſed of a very conſiderable quantity of plate, ſome part of which was in common uſe, and another part of it generally locked up, and had been uſed very rarely; ſhe had alſo a library of books, and a quantity of ornamental china. The queſtion was, Whether any, and which of theſe articles paſſed to the defendant Mr. *Pawlett*, as *houſehold furniture?* The perſon who drew the will gave parol evidence, that the teſtatrix did not mean that the plate ſhould paſs, but the court rejected it. The Maſter of the Rolls, after a long conſideration, held that the library did not paſs, but that all the plate did; that it was a matter of no weight, whether the plate was in ordinary uſe or not, nor whether it ever had been in uſe; for if a perſon of quality buys plate, it will fall under the denomination of *houſehold furniture*, although it was never uſed; but on the other hand, if a tradeſman buys plate with a view to profit by it in the way of ſale, and afterwards uſes it *occaſionally*, it will not paſs. His Honour alſo determined, that the ornamental china paſſed as *houſehold furniture*, but *ſecùs* as to *globes* and *mathematical inſtruments*.

and

and if a female dies unmarried, and within the age of 21, her ſhare ſurvives likewiſe, and the orphan cannot give it away by will.

Feaubert *verſus* Turſt. Caſe 169.

13 Viner, p. 411, pl. 1. 2 Eq. abr. 475, c. 1. (a) S. C. Cro. Car. 365. 1 Wms. 431. 1 Atk. 19 and 47.

ON a marriage of two *French* people in *France*, the contract was, That the huſband ſurviving the wife, ſhould have two thirds of her fortune for life, (whereas by the cuſtom of *Paris*, where they married, he would have had but a moiety) and 300 livres in the firſt place, by way of preſent, and that the reſt ſhould * go according to the cuſtom of *Paris*; after, they fled hither from the perſecution; and ſeveral years after the wife died, her relations brought a bill for an account of the eſtate, and to have the benefit of the ſaid contract.

An agreement made at *Paris* on the marriage of two *French* people touching the wife's fortune, decreed here to be executed accordingly.

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It was objected they could not bring over the *French* law hither, but muſt now be governed by the laws of *England*, where the huſband ſurviving is entitled to all the wife's perſonalty; at leaſt, there was no colour to carry it further than the ſum ſtipulated in the contract, and not to that which was left to go according to the cuſtom of *Paris*, which is only a local law, and therefore they could have no benefit of it here.

3 Wms. 371.

‡ It was anſwered, that marriage contracts are to be ſupported in all countries, without regard to the place where made; and that this contract did extend to the whole fortune of the wife, and not only to the particulars mentioned; and the ſaying the reſt ſhould go according to the cuſtom of *Paris*, is as much as if the cuſtom had been recited at large, and that the fortune ſhould go ſo.

‡ 5 Viner, 511. pl. 22.

My Lord Keeper decreed relief only as to the ſum ſtipulated; ‖ but on appeal to the Lords, they had relief for the whole.

‖ 1 Brown's Parl. Caſes, 38. where the caſe is much more fully and correctly ſtated.

Croyſton

Caſe 170. Croyſton *verſus* Banes.

Poſt, 374. 526. 534. Gilb. Chan. 237. S. C. Gilb. Caſes in Equity, 35. Eq. abr. 19. S. C. pl. 3. 2 Eq. abr. 44, c. 6. 47. 15. 1 Wms. 618. 2 Vezey, 441. 1 Bacon's Abr. (tit. Agreement) 6. Brown's Rep. 404.

If on a bill brought to have execution of a parol agreement, the defendant by anſwer confeſſes the agreement without inſiſting on the Statute of Frauds, &c. the court will decree an execution, becauſe no danger of perjury.

IN this caſe the Maſter of the Rolls declared, that if a bill be brought here for execution of a parol agreement, which is in no part executed, if the defendant does by anſwer confeſs the agreement *without inſiſting on the Statute of Frauds and Perjuries*, the court will decree an execution of the agreement, becauſe when the defendant confeſſes it, there is no danger of perjury, which was the only thing the ſtatute intended to prevent ‡.

209

Caſe 171. * Martyn *verſus* Kingſly.

If one truſts his ſcrivener (who puts out money for him) with the cuſtody of his bond, and the ſcrivener receives the money, and delivers up the bond, the obligee is barred as againſt the obligor for ever; *ſecus* in caſe of a mortgage, becauſe a legal eſtate is veſted, which cannot be diveſted without aſſignment.

IN this caſe a difference was made, where a man truſts his ſcrivener (who puts out money for him) with the cuſtody of his bond, and where with the cuſtody of his mortgage; in the firſt caſe, if he receive the money, and delivers up the bond, this ſhall bar the obligee; not ſo in the caſe of a mortgage, becauſe a legal eſtate is veſted, which cannot be diveſted without aſſignment.

Caſe 172. Rudyard *verſus* Neirin & Ux'.

2 Freeman, 262. S. C. 2 Eq. abr. 137, c. 3. S. C.—*è contrà*, 3 Wms. 199. (n.)

A woman having 1200*l.* in poſſeſſion, and 1200*l.* in the chamber of *London*, on her marriage, the huſband's father, in conſideration of this fortune, ſettles 240*l. per ann.* jointure on her; the huſband dies, and the wife adminiſters to him, and the repreſentatives of the huſband's father bring a bill for the 1200*l.* in the chamber of *London*, the father being, as alledged, a purchaſer of it by the ſettlement. Bill diſmiſſed, the huſband having done nothing to alter the property in his life-time.

THE defendant *Hannah* being daughter of Mr. *Hampton*, on a marriage treaty between her and the plaintiff's teſtator's ſon *Thomas Rudyard*, in conſideration of 1200*l.* paid, or

‡ Vide 23 *G.* 3. cap. 58. which directs that all agreements ſhall be made upon ſtamped paper.

ſecured

ſecured to be paid to the father and ſon, or one of them, in part of her portion, and in conſideration of 1200 *l.* more, due and owing to her by the chamber of *London*, and other expectancies out of the perſonal eſtate of her father, and in conſideration of 5*s.* a ſettlement was made on her by way of jointure, and a covenant in the deed, that the jointure lands were of the clear yearly value of 240 *l. per ann.*

The marriage was had, and *Thomas Rudyard* the ſon died inteſtate without iſſue, and without making any alteration of the debt due from the chamber of *London* to his wife; ſhe takes out adminiſtration to him, and afterwards intermarried with the defendant.

Thomas Rudyard the father died, having made his will, and his wife executrix, who never demanded this * debt, but died, having made her will, and the plaintiff her executrix; and there having been, a little before the death of *Thomas Rudyard* the father, an act of parliament made for turning the chamber debt into a perpetual intereſt, 210

The plaintiff, as executrix of *Mary Rudyard*, who was executrix of *Thomas Rudyard* the father, brought this bill againſt the defendants to have an account of this debt, and to have it aſſigned to her, for that, as it was alledged, the ſettlement did amount to an agreement, that the father ſhould have the benefit of this debt, the ſettlement being made by him, and this being part of the conſideration, and therefore ſhe, as his repreſentative, entitled to the benefit of it; or if it ſhould be taken upon the wording of this deed, that the father and ſon were jointly entitled to it, the father would have the whole by ſurvivorſhip; or if it were to go equally to the father and ſon, ſhe, as repreſentative of the father, would be entitled to a moiety of it.

The defendant inſiſted, that when he married his wife, he took this debt to be her own, and that this did not amount to an agreement, that either father or ſon ſhould have this debt otherwiſe than as it did belong to the wife; and though it is true, he as her huſband might have diſpoſed of it, yet having done

done nothing of that kind, it does now belong to the wife that has ſurvived him; and of that opinion was my Lord Keeper, and diſmiſſed the bill.

211
Caſe 173.
9 *December.*

Barlow & Ux' *verſus* Heneage.

* Eq. abr. 283, c. 2. S. C.

A father makes a voluntary ſettlement to truſtees and their heirs, in truſt, to receive the profits, and to put them out for the increaſe of the fortunes of his daughters *A.* and *B.* and alſo executes a bond to the ſame truſtees to pay them 1000 *l.* at a certain day, in truſt for the ſaid daughters, but kept both deed and bond by him till his death, and received the profits; and then by will taking notice of the bond, gives legacies to *A.* and *B.* in ſatisfaction thereof, and the ſurplus of his perſonal eſtate to his ſaid two daughters, and his four younger children; yet *A.* and *B.* electing to have the benefit of the ſettlement and bond decreed for them, and an account of the profits from the date of the ſettlement, and the 1000 *l.* with intereſt, from the time it was payable by the bond.

THE caſe was, *George Heneage* made a voluntary ſettlement to truſtees and their heirs, in truſt, that they ſhould receive the profits, and put them out * from time to time for the increaſe of the fortune of his daughters *Winifred* (the now plaintiff) and *Cicely*; and if either of them died before 18, or marriage, the whole to go to the ſurvivor, and entered into a bond of 2000 *l.* penalty to the ſame truſtees, to pay 1000 *l.* to them at a certain day, in truſt for the ſaid daughters, but kept both deed and bond in his own power, and received the profits of the eſtate till his death.

Afterwards by will, taking notice of the ſaid bond, he gives to his ſaid two daughters, legacies in full ſatisfaction of the benefit of the ſaid bond; and the ſurplus of his perſonal eſtate, after debts and legacies paid, to go equally between the ſaid daughters, and his four younger children.

The plaintiffs brought this bill to have an account of the perſonal eſtate, and a ſatisfaction for the profits of the ſettled eſtate, from the date of the ſettlement, and the 1000 *l.* with intereſt, from the time it was payable.

It was objected, that the ſettlement and bond being both voluntary, and always kept by the father in his own hands, and ſo might have been deſtroyed when he pleaſed, were to be taken only as a cautionary proviſion, in caſe of ſudden death, and therefore they ought not to have either profits or intereſt, farther than from the death of the father; and the rather, for that

otherwiſe it would ſwallow up all the perſonal eſtate, and leave the younger children unprovided for.

But my Lord Keeper ſaid, *theſe were the father's deeds*, and he could not derogate from them; but at laſt the defendants agreed to ſet the profits of the lands received during the father's life againſt the two daughters maintenance, but inſiſted to have intereſt on the bond for the time the money was payable, and it was decreed accordingly.

1 Atk. 625, and 1 Wms. 577. there cited.

* Earl of Peterborough *verſus* Ducheſs of Norfolk. 212 Caſe 174.

IN this caſe my Lord Keeper declared his opinion, that depoſitions taken in a cauſe where tenant in tail is party, cannot be read againſt the iſſue in tail. But *Note*; This was extrajudicial, and not the point in queſtion, for the caſe at the bar was of tenant for life, with remainder to his ſon in tail; and the depoſitions were taken in a cauſe, wherein only the father, tenant for life, was party.

Depoſitions taken in a cauſe wherein tenant in tail, or the father, is only tenant for life; remainder to the ſon cannot be read againſt the ſon.

Button *verſus* Price. Caſe 175.

Poſt, 295. 1 Brown's Parl. Caſes, 70. 590.

THIS cauſe was heard by default in Chancery, and this decree made abſolute by default; and the defendant brought an appeal before the Lords, but the proofs not having been read below, they would not ſuffer them to be read above; ſo the appeal was diſmiſſed.

No proofs to be read in the Houſe of Lords, which were not made uſe of in Chancery.

*DE

Termino S. Hillarii,

1702.

In Curia Cancellariæ.

Warr *verſus* Warr.

Caſe 176.

26 *February.*

Antè, 109. Eq. abr. 267, 3. S. C.

Portions provided by marriage ſettlement for younger children, to be paid at ſuch time as the truſtees ſhall think proper. One of the children dying at ſeventeen before any appointment, his portion ſhall ſink in the inheritance; but maintenance, and a ſum paid in placing him out apprentice, to be allowed out of the truſt eſtate.

UPON a marriage ſettlement, the father had power to raiſe a term for 99 years, in lands, not exceeding 200*l.* *per ann.* for raiſing portions for younger children, *viz.* to the eldeſt of the younger ſons 1000*l.* and 500*l.* apiece for every other younger ſon, and ſo for the daughters, to be paid *at ſuch time as the truſtees in their diſcretion ſhould appoint, for their better maintenance and preferment*; the father limits a term accordingly, and dies, leaving two ſons and two daughters; the youngeſt ſon is put out to a ſea captain, and dies at ſeventeen, the truſtees having made no appointment for payment of his portion; the daughters attained 21, and the truſtees appointed their portions to be paid, which was done accordingly; and they likewiſe inſiſted on having a ſhare of the youngeſt brother's portion.

The eldeſt ſon brought this bill to have the term aſſigned to him, his brother being dead before he had occaſion for his portion, and before any appointment by the truſtees, and therefore it ought to ſink in the inheritance for his benefit.

The

* The Maſter of the Rolls was of the ſame opinion, and decreed the term to be aſſigned the plaintiff, but it was agreed all the children were to be maintained out of the truſt eſtate, they having no maintenance appointed in the mean time, and what had been employed for putting out the younger ſon to go out of the truſt eſtate. 214

Attorney General, at the relation of Hindley, *verſus* Sudell, Heſkith, and Scarſbrick.

Caſe 177.

2 Eq. abr. 377, c. 1. S. C.

THE defendant *Heſkith*, ſeiſed of a manor with an advowſon appendant, makes a mortgage of the ſaid manor in fee (which mortgage after came to the defendant *Scarſbrick*); then he preſented one *B.* by ſimony, and *B.* was for that reaſon refuſed by the biſhop; then he preſented the defendant *Sudell*, and he was inſtituted and inducted.

A. mortgages a manor (to which an advowſon was appendant) in fee to *B.* then *A.* preſents *C.* by ſimony; and *C.* being for that reaſon refuſed by the biſhop, *A.* preſents *D.* who is admitted, *&c.* but after reſigns, and is again preſented by *A.* and *B.*; the relator having got an aſſignment of the king's title for the ſimony, brings his *Q. Impedit* and a bill in this court, that the mortgage may not be ſet up, nor given in evidence againſt him at law, and decreed accordingly.

The relator *Hindley* being informed of *B.*'s ſimony, applied for the king's title, but before he had got it *Sudell* reſigned, and was again preſented by *Heſkith* and *Scarſbrick*.

The plaintiff brought a *Qua. Imp.* and alſo this bill, to diſcover if it was not agreed, that notwithſtanding the mortgage, the mortgagor ſhould preſent, and to be relieved; and that the mortgage might not be given in evidence at law.

† As to the diſcovery of the ſimony which the bill ſought, the defendants demurred, and it was allowed by the court. † Vid. Brown's Rep. 96.

But as to the other matters, it was urged for the relator, that if this court will not aſſiſt, the Statute of Simony will ſignify nothing; and that this court helps * the king to an equity of redemption, being entitled by forfeiture for treaſon; it was likewiſe urged, that the mortgagee is but a truſtee for the mortgagor, and in this caſe the mortgagee joined with the mortgagor, which ſhews he did not do it as inſiſting on his own right: and the policy of the law is, that one who has been 215

† Antè, 75. guilty of ſimony, ſhall not be admitted to preſent again. † A mortgage here is conſidered only as a ſecurity for money; now the mortgagee's money is never the better ſecured, and it is a thing not ſaleable, and therefore the mortgagee is not to have preſentation; and all that is ſought is but to remove an impediment to try a title.

On the other ſide it was ſaid, the mortgagee is not a truſtee in this matter, eſpecially the mortgagee being in poſſeſſion; that an advowſon is valuable, and comprehended within the mortgage, and may be ſold; and this is a penal law, and not to be aided in this court.

Lord Keeper. I conſider what will be the conſequence both ways, and if this practice be not avoided, it will in a great meaſure avoid the laws againſt ſimony, for this will lead to the caſe of truſtees; and it being a conſtant rule here, that *Ceſtuique Truſt* ſhall have the benefit of the thing, if he be to have it, to all intents, but to forfeit; then the corrupt patron ſhall preſent by his truſtee, which is contrary to the plain intention of the act; and though this be called a penal law, yet this court will aid remedial laws, not by making them more penal, but to let them have their courſe, and the law knows nothing of a truſt; and therefore this court will take care that its own notions ſhall not be made uſe of to elude ſo good and beneficial a law; and decreed the title not to be ſet up.

D E

*D E 216

Termino Paſchæ,

1703.

In Curia Cancellariæ.

Sir John Packington *verſus* Barrow. Caſe 178.

2 Eq. abr. 474, c. 2. S. C. 2 Vern. 189.—*à contrà*, 1 Vern. 132.

If a fine be gained by fraud from a feme covert under age, who dies, and her heir buys in a prior mortgage, and then levies a fine, and five years paſs, and then thoſe who claim under the fine bring a bill to redeem, &c. Equity will not aſſiſt them claiming under ſuch fraudulent title, and alſo by reaſon of the fine and non-claim.

SIR *Herbert Parrott* had iſſue *Herbert Parrott*, his ſon and heir by his firſt wife, and by his ſecond he had iſſue a daughter, who was married to the plaintiff Sir *John Packington*. *Herbert Parrott* married a young heireſs, and by indirect means procured her to levy a fine of her inheritance when ſhe was under age; and Sir *Herbert Parrott* his father was one of the commiſſioners who took the fine; and the uſes of the fine were declared to be to her and her huſband, and the heirs of their two bodies, remainder to the heirs of the ſurvivor.

She afterwards died in her minority without iſſue, and her huſband ſurvived her, and made a mortgage of the premiſſes, or part of them, to Mr. *Vanaker*, and died without iſſue, and the land deſcended to *James Parrott* his uncle, and from him to Sir *Herbert Parrot* his elder brother, and from him to his daughter the

wife of the plaintiff Sir *John Packington*; but the defendant *Barrow*, who was heir at law to Mrs. *Parrott*, who had levied
217 the fine, had purchaſed in *Vanaker*'s mortgage, and * got into poſſeſſion, and levied a fine, and five years paſſed, and the deed, declaring the uſes of the fine that was levied by Mr. *Parrott* and his wife, was loſt.

Sir *John Packington* and his wife, who were entitled under this deed and fine, brought this bill to have a diſcovery of the deed, and a redemption of the mortgage.

The defendant pleaded the ill practices in obtaining the fine, and alſo his own fine and non-claim, and that there was no ſuch deed as the plaintiff ſought a diſcovery of; or if there was, it was obtained by fraud.

On arguing the plea, the benefit of it was ſaved to the hearing; and now the cauſe coming on to be heard, the plaintiff having proved ſuch deed to be executed, and the ſubſtance of it, would have it preſumed to be in the defendant's cuſtody, becauſe he had purchaſed in the mortgage, and the mortgagee could have no good title without it, and prayed that the mortgage might not be ſet up againſt them.

The defendant alledged, that the plaintiff had not proved that the defendant had the ſaid deed, or purchaſed in the ſaid mortgage, or that there was any mortgage at all, or if there were, it was but of part of the lands, and therefore would not hinder their going to law; and ſaid, that the fine levied by the defendant, and non-claim, made a good title at law to him; or however, that this court would not aſſiſt the plaintiff, who claimed under a fine ſo ill obtained; and the rather, for that the plaintiffs were volunteers without any agreement previous to the marriage of the ſaid feme covert to ſettle her eſtate.

It was replied, that no doubt there was ſuch a mortgage, elſe the defendants need not oppoſe an order that it ſhould not be ſet up at law; that the defendants were no purchaſers; and though the court will not perhaps aid an ineffectual voluntary con-

conveyance, yet if the conveyance be good, the court will aſſiſt it to have all the conſequence of a conveyance.

Curia. The defendant inſiſts there was no ſuch deed; or if there was, it was obtained by mal-practice, and alſo on a fine and non-claim, and Sir *Herbert*, in taking the fine from his daughter-in-law, could not have been aſſiſted here, and the plaintiffs claim under him. All titles at law that are not directly againſt conſcience, ſhall be aſſiſted here to a redemption; and if there were only a blemiſh in the title, ſo ſhould the plaintiffs; but I cannot get over the fine and non-claim; the plea is good; diſmiſs the bill. 218

Buſhnell *verſus* Parſons. Caſe 179.

John Buſhnell being indebted, makes a leaſe for 21 years to the defendant (his wife's nephew) in truſt for payment of his debts and legacies, and at the ſame time made his will, and thereby reciting, that he had ſo made a leaſe for payment of his debts and legacies, deviſes the lands, after the expiration of the ſaid leaſe, to the plaintiff (who was his nephew and heir) and made the defendant executor.

A. makes a leaſe to *B.* (his wife's nephew) for 21 years, for payment of his debts and legacies, and at the ſame time by will, taking notice of the ſaid leaſe, deviſes the lands, after the expiration of the ſaid leaſe, to *C.* his nephew and heir, and makes *B.* executor. *A.* lives twelve years, and pays all his debts himſelf; and the perſonal eſtate was ſufficient for the legacies *C.* brings his bill to have the leaſe delivered up, the truſts being performed, but diſmiſſed, the reverſion only after the expiration of the term being deviſed to him.

The teſtator lived twelve years after the making this leaſe and will, and paid all his debts himſelf, and left perſonal eſtate more than ſufficient to pay his legacies.

The plaintiff brought this bill for an account of the profits, and to have the leaſe delivered up, the truſts for which it was made being performed.

The defendant by anſwer inſiſted, that the teſtator intended he ſhould have the benefit of this leaſe, and had one witneſs that ſwore, that on the defendant's treaty of marriage with his wife, the teſtator, to promote it, ſaid, he had ſettled a leaſe for 21 years on him.

2 Eq. abr. 540, c. 3. 1 Vern. 255.

219 * My Lord Keeper put the caſe of a deviſe of a legacy to a mother for maintenance of her child; though the child die, the mother ſhall have the legacy, and thought the defendant's proof ſufficient to rebut the plaintiff's equity, if he had any, which he thought he had not, the reverſion only being deviſed after the expiration of the leaſe, and ſaid it did not differ from the caſe of *Crompton verſus North*.

1 Chan. Caſes, 196. Brown's Rep. 89. S. C. cited.

Caſe 180. Angell *verſus* Smith.

2 Eq. abr. 633, c. 1. S. C.

Where the plaintiff, a pauper, had a decree for the duty and coſts, and the Maſter taxed full coſts; yet on motion, ordered plaintiff and his ſolicitor to make oath before a Maſter of what they had paid, or were to pay, and that to be allowed, but no further.

THE plaintiff brought a bill in *formâ pauperis*, and had a decree to recover the duty with coſts; the Maſter taxes coſts as uſual for perſons not paupers.

Defendant moves, that he may tax only pauper coſts, and ſaid it was unreaſonable the plaintiff ſhould have more coſts than he was out of pocket; that it would encourage paupers to be vexatious, to be aſſured, if the cauſe went againſt them, they ſhould pay no coſts; and, if for them, ſhould recover not only the thing in demand, but a good ſum of money too, which they never expended; and cited the caſe of *Harvey* verſus *Tuder*, 22 *December*, 9 *W.* 3. where the plaintiff, who was a pauper, having obtained a decree with coſts, and the Maſter having taxed coſts as uſual, on exceptions to the Maſter's report, for that cauſe the Chancellor allowed only pauper coſts.

On the other ſide it was ſaid, that the counſel, clerks, and ſolicitors, gave their labour to the pauper out of charity, and not to his adverſary, and therefore he ought to have coſts as others, where the decree is for coſts generally, though the court may, if they find him vexatious, order pauper coſts only; but that is

220 by ſpecial order, in caſes of contempts, inſufficient * anſwers, &c. but where coſts are ſtated, and of courſe he is to have the ſame as thoſe that are not paupers, and cited the caſe of *Hautton* verſus *Hager*, where the plaintiff, a pauper, had a decree

cree with coſts, and the uſual coſts were taxed; and on petition that it might be pauper coſts only, the Lord *Somers* would not allow it.

My Lord Keeper ſaid, it was unreaſonable any one ſhould have more coſts than out of pocket, and ordered the plaintiff and his ſolicitor to make oath before the Maſter; and what they ſwore they had paid, or were to pay, was to be allowed, but no further.

* D E

Termino S. Trinitatis,

1703.

In Curia Cancellariæ.

Caſe 181. **Langdon, executor of Dickenſon, *verſus* African Company and Dockwray.**

2 Eq. abr. 243, c. 9. 586, c. 1. S. C. 2 Wms. 424.

Where one recovered in trover againſt a ſervant of the *African* company, equity would not relieve, becauſe plaintiff in equity might at law have defended himſelf; but decreed that the company ſhould indemnify the ſervant; and that the plaintiff at law (one of the defendants in equity) might proſecute the decree in the ſervant's name.

IN 1676 the plaintiff's teſtator being commander of the ſhip *Hunter*, ſent by the king (at the inſtance and charges of the *African* company, to whom the king had granted the ſole trade on the coaſts of *Guinea*, excluſive of all others) to ſeize all interlopers in *Africa*.

Accordingly, in 1677, he ſeizes the ſhip *Anne* (whereof the defendant *Dockwray* was freighter) trading in *Africa*, and ſhe was condemned as a prize in *Africa*, and her cargo accounted for to the *African* company.

In 1696, the defendant *Dockwray* brought trover and converſion againſt the plaintiff's teſtator, and recovered 2500 *l.* damages for the ſaid ſhip and cargo.

This bill was brought to be relieved againſt it, but was diſmiſſed, as againſt the defendant *Dockwray*.

But

* But as againſt the company, it was decreed they ſhould indemnify *Dickenſon*, and that the defendant *Dockwray* might proſecute the decree in *Dickenſon*'s name; and though *Dickenſon* had received 700 *l.* from the company for that ſervice out of the ſaid cargo, he was not to refund or abate that, becauſe it was only a gratuity to him, he acting only as a ſervant or agent to them, and as to the *quantum* of the damage they were bound by the recovery againſt *Dickenſon*, becauſe they might have defended the trial; and this was ſaid to be in the nature of an interpleading bill. 222

Rawſton *verſus* Reading. Caſe 182.

A Caſe was ordered to be ſtated, and was this; *William Lane* had iſſue only two daughters, one whereof was dead; and left iſſue *Lane Bernard* her heir, and one of the co-heirs of the ſaid *William Lane*. *William* by will deviſes the eſtate to *Lane Bernard* and his heirs; and if he ſhould take one moiety by deſcent, and the other by purchaſe, or the whole by purchaſe, was the queſtion; and it was adjudged he took the whole by purchaſe.

1 Inſt. Harg. ed. 23. a. Plowden, 545. 1 Salk. 232. S.C. 2 Eq. abr. 333.

*DE

Termino S. Mich.

1703.

In Curia Cancellariæ.

Caſe 183.

Webſter *verſus* Biſhop & al'.

2 Vern. 444. S. C. Eq. abr. 51, c. 1. S. C. 2 Eq. abr. 93, c. 7. S. C.

One of the parties to an award, made on a ſubmiſſion in court purſuant to the late act of parliament, dies before the money paid, no *Sci. Fac.* can iſſue againſt his heir or executor to inforce payment; for the award, though eſtabliſhed by the court, is not in nature of judgment or decree to be proſecuted, but in nature of a contempt, which dies with the perſon, and ſo held all the judges.

PLAINTIFF and defendant's teſtator had ſubmitted to an award by order of this court, and the teſtator was awarded to pay a ſum of money, and an attachment went againſt him, purſuant to the late act, for non-payment of the money awarded (the award having been controverted here by affidavits, purſuant to the ſaid acts, and eſtabliſhed by the court) but he dying before any farther proceedings, a *Scire Facias* was now prayed againſt the heir and executor, to ſhew cauſe why they ſhould not pay the money.

It was urged, that it will not lie, becauſe there is no cauſe in court, and the ſtatute ſays only, it ſhall be proſecuted as in caſe of a contempt in other caſes, and a contempt dies with the perſon.

On the other ſide it was ſaid, that this was in nature of a judgment or decree, and the executors might be brought in to pay

pay it, if they had aſſets; but becauſe this concerned all the courts as well as this, the judges were conſulted in it, who all were of opinion, that the proſecution * determined by the death of the party, and could not be revived or carried on farther, 224

Staplehill & Ux' *verſus* Bully. Caſe 184.

Eq. abr. 258, c. 2. S. C.

A limitation to a ſecond ſon in remainder in tail, on a ſettlement made on the marriage of the firſt ſon, and in conſideration of the wife's portion, makes not the ſecond ſon a purchaſer.

A. The father, having iſſue *B.* and *C.* his ſons, on the marriage of *B.* covenants, before the end of *Eaſter* term then next following, to levy a fine to the uſe of *B.* and the heirs of his body, remainder to the uſe of *C.* and the heirs of his body, remainder to *A.* in tail, remainder to him in fee.

The fine was levied as of *Eaſter* term, but the marriage being put off till after *Eaſter* term, the deed was not dated till after, ſo the fine was levied before the date of the deed, and by conſequence, the ſaid deed was no declaration of the uſes of that fine.

The father died, and then *B.* dies, leaving iſſue *William*; and *William* being ſick, and having borrowed ſome money of the defendant, who was his brother-in-law, made him a leaſe for 99 years, if three lives ſo long live, under a proviſo to redeem on payment of what due, and within a few days after dies without iſſue.

C. claimed the lands, by virtue of the marriage ſettlement, and brought an ejectment, but could not prevail, by reaſon of the ſaid defect before mentioned; and ſo he brought this bill to have the ſettlement made good, and the defendant's leaſe ſet aſide.

But becauſe the limitation in remainder to him was voluntary (the conſideration of *B.*'s marriage not extending to it) and the ſettlement not good, *C.* was but an equitable remainder-man in tail at beſt, and *William*, who made the leaſe to the defendant, was alſo tenant in tail, in equity, and might, by any conveyance, bar the ſettlement; therefore the plaintiff muſt redeem

on

on the terms in the leaſe; for any conveyance by tenant in tail, in equity, is good, and decreed accordingly.

225 Caſe 185. *November* 9.

* Attorney General, at the relation of the pariſhioners of St. Clement Danes, *verſus* Lady Hart & al'.

2 Eq. abr. 198, c. 1. 750, c. 1. S. C.

Lands of 8 *l. per ann.* purchaſed by a pariſh in truſt for charitable uſes, by building, *&c.* improve to 450*l. per ann.* and the truſtees, by order of the veſtry, for 1000*l.* for the uſe of the pariſh, make this eſtate a ſecurity for 100*l. per ann.* annuity, and the pariſhioners would ſet aſide this agreement as a breach of their charity, but their bill was diſmiſſed.

THE 5th of *Ed.* 6. one *William Burton*, in conſideration of 160*l.* conveys a meſſuage, called the *Slaughter-Houſe*, in *High Holborn*, then in leaſe at 8*l. per ann.* to ſeveral perſons in fee, in truſt, to apply the profits for maintenance of 12 men of the pariſh, who had been churchwardens; and that when the number of truſtees were reduced to four or three, they to fill up the number.

After, by building, *&c.* the rent of the premiſſes was increaſed to 450*l. per ann.* and employed in augmentation of the charity.

19 *July*, 1682, a new feoffment was made to other perſons, and the charity expreſſed in the deed in the ſame manner as in the firſt deed, only that here it was expreſſed to be for the poor in general, without confining it to the number of 12.

The truſtees, by order of the veſtry, for 1000*l.* paid for the uſe of the pariſh, deviſe part of the premiſſes to ſome of the defendants for 99 years, if the Lady *Hart* ſo long live, under a proviſo, to be void on payment of 100*l. per ann.* to her during ſo many years of the ſaid term as ſhe ſhould live; and in the deed it is mentioned, that the premiſſes were conveyed to the grantors by deed, 19th *July* 1682.

This bill was now brought to ſet aſide this deed of annuity, as being made in breach of the charity, and ſo already decreed by the commiſſioners of the charitable uſes, and by them ſet aſide.

226 * The defendants inſiſted they had a good title at law, and were purchaſers for valuable conſideration, and the money paid for

for the benefit of the pariſh, and no expreſs notice of the truſt was made out, but only by a recital; and however the land was at firſt a pariſh purchaſe, and the profits not above 8 *l. per ann.* it is to be preſumed the pariſh at their charges improved it to 450 *l.* and therefore have the diſpoſal *pro tanto*; and the pariſhioners from time to time have made leaſes on fines, and employed the money to pay pariſh debts; and if this be ſet aſide, all muſt, and it will be no benefit to the poor; and all above the maintenance of 12 they may diſpoſe of to any other like uſes.

The Lord Keeper ſeemed clear to diſmiſs the bill; but after the plaintiffs ſubmitted to pay the arrears and growing payments; and ſo it was decreed, and coſts ſpared.

Caſon & al' *verſus* Round & al[r] Caſe 186.

2 Eq. abr. 594, c. 4. S. C. 2 Wms. 494, and 2 Atk. 350, 399, as to the general point of notice.

Notice muſt be denied poſitively, not evaſively.

CASON had a mortgage of certain lands, whereof the defendant had *a prior mortgage*, and afterwards lent a further ſum to the mortgagor on a ſtatute; but as the plaintiff alledged, the defendant had notice of the plaintiff's mortgage before the laſt money lent. Defendant by anſwer did not deny notice poſitively, but evaſively; and the plaintiff could not prove notice till after the lending the laſt money; yet, becauſe the defendant had not denied notice poſitively, Lord Keeper and Maſter of the Rolls decreed a redemption, on payment of the firſt money only.

Aſhton

Caſe 187.

† Aſhton *verſus* Aſhton.

2 Vern. 452. S. C. 2 Eq. abr. 212, 2. S. C. 1 Vern. 20. 2 Vern. 357. 572. 1 Mod. 300. 1 Wms. 284. 2 Wms. 528. 3 Wms. 238. 2 Wms. 628.

ONE deviſes his real and perſonal eſtate to make up the portions, provided for his daughters by his marriage ſettlement, 3000 *l.* apiece, provided they marry with the conſent of their mother and brother; * and if without ſuch conſent, then to be applied to other purpoſes.

1 Vezey, 5. 1 Atk. 361. 381. 502. 2 Atk. 17. 584. 587. 3 Atk. 504. Brown's Rep. 303.—*è contrà*, Poſt, 348. 562. 1 Chan. Caſes, 22. 144. 2 Vern. 223. 293. 580. 547. 2 Atk. 184. 261. 265. 3 Atk. 364.

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Lord Keeper and Maſter of the Rolls held this a ſubſequent condition, and that the additional portions are payable at the ſame time with the portions provided by the ſettlement, which was 18, or marriage; and therefore decreed the lands to be ſold to the beſt purchaſer, and the money to be brought before the Maſter, and intereſt paid the daughters from their reſpective ages of 18 years, and the principal at 21, if they were then married with ſuch conſent; and if not then married, † they *to give their own recogniſance to repay for the purpoſes in the will, if they after marry without ſuch conſent*; and the court declared they could not diſpenſe with the forfeiture, nor alter the will.

‡ Vide Lord H's. obſervation upon this part of the decree, 3 Atk. 335.

† This caſe is reported in Vernon under the name of *Aſton* v. *Aſton*: it is alſo reported in 3 Wms. 106. and Caſes temp. Talb. 152. but reſpecting another point.

The caſe of *Harvey* v. *Aſhton* (1 Atk. 363.) was heard at the Rolls before Sir *J. Jekyll*, and it was determined, that the portions were *raiſable* (Caſes temp. Talb. 212.) It came on before Lord *Hardwick*, upon a petition to diſcharge the order made by the Maſter of the Rolls for raiſing the portions; and after a very full argument before his Lordſhip, the two Chief Juſtices, and Mr. Juſtice *Comyns*, it was decreed, that the order of the Maſter of the Rolls ſhould be diſcharged.

In the above authority the reader will find the caſes reſpecting this point cited and commented upon both in the arguments of counſel and opinions of the judges, in which the principles of this doctrine are thoroughly canvaſſed.

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* DE 228

Termino S. Hillarii,

1703.

In Curia Cancellariæ.

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‡ Sir George Chidley & Ux' *verſus* Lee. Caſe 188.

2 Eq. abr. 350, c. 3. S. C.—*è contrà*, 2 Vern. 484. 2 Atk. 521.

A legacy of 150*l.* given by a collateral anceſtor to the daughter of *A.* which was paid *A.* and who after gave her 1000*l.* portion, ſettled a church leaſe on her, and maintained her and her huſband 14 years; yet held no ſatisfaction.

MR. *Lee* was father to the plaintiff's wife, and had in his hands a legacy of 150*l.* which had been given her by a collateral anceſtor.

On her marriage with the plaintiff, the defendant her father gives her 1000*l.* portion, and after ſettles a church leaſe on the plaintiffs, and maintained them 14 or 15 years at his own houſe, and no notice was ever taken of the legacy, nor for aught appeared did the huſband know any thing of it; yet after ſome difference between them, and a bill brought, the legacy was decreed with intereſt and coſts; and the Maſter of the Rolls ſaid, he could not diſcharge it, though he diſliked the ſuit.

Woolnough *verſus* Woolnough. Caſe 189.

2 Eq. abr. 290, c. 6. S. C.

A deviſe by *Ceſtuique Truſt* in tail ſufficient to bar the intail.

IN this caſe, my Lord Keeper declared, that a deviſe by *Ceſtique Truſt* in tail in truſt, is good without any farther act to bar the intail in tail.

‡ Lord *Hardwicke*, in the deciſion of *Wood* v. *Briant* (2 Atk. 523.) obſerves, that this was an hard caſe, and that he ſhould have been inclined to have determined it otherwiſe.

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* D E

Termino Paſchæ,

1704.

In Curia Cancellariæ.

Caſe 190. **Sir Richard Leving *verſus* Lady Caverly & al'.**

The anſwer of a ſuperannuated perſon put in by guardian, ſhall be read againſt him, as an anſwer of one of full age; *ſecus* of an infant, who is to have a day to ſhew cauſe.

IT was agreed *per Cur.* that the anſwer of a ſuperannuated defendant put in by guardian, is to be read againſt him, as an anſwer of one of full age put in in perſon; and a difference was taken between ſuch an anſwer, and that of an infant put in by guardian; † becauſe an infant improves and mends, as my Lord Keeper ſaid, and therefore is to have a day to ſhew cauſe after he comes of age; but the other grows worſe, and is to have no day.

† Vid. Gilb. Rep. in Eq. 4.

Caſe 191. **Hodgſon *verſus* Hitch & al'.**

5 Rep. 68. 2 Barnardiſt. 118. 2 Eq. abr. 415, c. 6. 8 Viner abr. 197, pl. 33. 2 Vern. 593, 624. 2 Wms. 136. 1 Vezey, 231. 2 Vezey, 216. 2 Atk. 239. 373. 3 Atk. 257. See alſo, Brown, 475.

Parol evidence admitted to aſcertain the *perſon the teſtator intended ſhould take a legacy.*

A Man makes his will, and thereby deviſes part of his real eſtate to *B.* (who was his heir at law) paying 100*l.* which he owed on bond to *Steel*, and deviſed the ſurplus of his perſonal eſtate to the plaintiff, who brought this bill, and ſuggeſted, that the teſtator did not owe any money to *Steel*, but the 100*l.* meant by that deviſe was 100*l.* he owed by bond to *Grace Beck*, then married to the defendant; and that the

230 * teſtator knew her to be married, but forgetting her huſband's name, called him *Steel* inſtead of *Hitch*; and this being proved by the perſon who drew the will, and another, the payment was decreed accordingly.

In Curia Cancellariæ.

DE

Termino S. Trinitatis,

1704.

In Curia Cancellariæ.

Le Clea *verſus* Trot. Caſe 192.

A *Ne exeat Regno* having been awarded againſt the defendant, *J. S.* (who was the now petitioner) became his ſurety to the ſheriff; after anſwer put in, *J. S.* petitions to be diſcharged, but was denied; then the cauſe was heard, and 19000 *l.* decreed againſt the defendant, and he committed for non-payment; and then *J. S.* petitions again to be diſcharged, becauſe being a *Manu-captor*, and the party in priſon, there can be no danger of his going beyond ſea.

A ſurety in a *Ne excat Regno* could not be diſcharged after anſwer put in by the defendant, nor even after decree againſt the defendant, and commitment for 19000*l.* decreed againſt him, for if (as urged) there is no danger of defendant's going beyond ſea (being in priſon) then the ſurety is in no danger.

Lord Keeper. If ſo, then his ſurety is in no danger; and would not diſcharge him.

* Griffith *verſus* Rogers. Caſe 193.

Antè, 12.

THE defendant's huſband, by will *(inter alia)* deviſed his library of books to *A.* (except 10 books, ſuch as his wife ſhould chooſe, as plays, romances, ſermons, but not law books) and made her executrix; and the queſtion was, Whether this executrix; this exception of the 10 books held not ſuch a deviſe to the wife, as ſhould exclude her from the ſurplus.

A huſband deviſes his library of books to *A.* except 10 books, ſuch as his wife ſhould chooſe, and made her

was ſuch a deviſe to the wife as would exclude her from the benefit of the perſonal eſtate, as executrix?

Per Curiam not; and my Lord Keeper ſaid, it is no deviſe of the 10 books to her, but only an exception of 10 out of the deviſe to *A.* and the executrix was the proper perſon to chooſe which ſhould be excepted, and it could not be thought he intended to bar his wife of the benefit of the executorſhip by ſo inconſiderable a deviſe.

*DE 232

Termino S. Mich.

1704.

In Curia Cancellariæ.

Laſſels *verſus* Lord Cornwallis. Caſe 194.

I. C. Precon. Ch. Rep. 279.

Antè, 52. 2 Vern. 465. S. C. 2 Eq. abr. 467, c. 11. S. C. 1 Atk. 465. 2 Vezey, 1.

A. on his marriage creates a term in truſt to raiſe 6000 *l.* of which 3000 *l.* was for his younger children, and the other 3000 *l.* as he ſhould appoint; after he appoints the 3000 *l.* as a collateral ſecurity to *J. S.* and by will deviſes it and the other 3000 *l.* to his daughter; yet held that it ſhould be aſſets to ſatisfy a bond creditor.

THE defendant's father, on his marriage ſettlement, created a term for 500 years, in truſt, to raiſe any ſum not exceeding 6000 *l. viz.* any ſum not exceeding 3000 *l.* for younger children, and any farther ſum not exceeding 3000 *l.* for ſuch purpoſes as he ſhould think fit; and after appoints the laſt ſum to be collateral ſecurity to Sir *Stephen Fox*, for his quiet enjoyment of an eſtate he had ſold him, on which there was ſome doubt of the title; and after, by will, appoints the 3000 *l.* ſubject to Sir *Stephen*'s collateral ſecurity; and alſo the other 3000 *l.* for his daughter, by the Dutcheſs of *Monmouth*.

The plaintiff, a bond creditor, brings his bill to have his debt out of the 3000 *l.* ſubject to Sir *Stephen*'s indemnity, that being a voluntary gift as to the daughter, and not to prevail againſt him; and that the will was a deviſe, not a farther appointment, for there was a compleat appointment before, though not a diſpoſition of the whole 3000 *l.*

233 * My Lord Keeper decreed the 3000*l.* ſubject to Sir *Stephen Fox*'s indemnity, to be liable to the creditors, becauſe he had a reſulting equity in it, which he might deviſe, but not to take place of creditors, and he had before made an appointment, which ſatisfied his power.

Caſe 195. Barſtow *verſus* Palmes & al'.

2 Eq. abr. 490, c. 2. S. C.

IT was held by my Lord Keeper, that where, on a bill brought by *A.* againſt *B. C.* and *D.* and others, the defendants had examined ſome witneſſes, that *B.* being now plaintiff, may read thoſe depoſitions againſt the plaintiff, or any of the defendants in the firſt cauſe.

Caſe 196. Kent *verſus* Bridgman.

2 Eq. abr. 159, c. 1. S. C. 243, c. 10. S. C.

A matter examinable and already determined at law, yet equity may give relief in it.

A. Recovers a judgment againſt the defendant's father, and the plaintiff (the ſheriff's bailiff) levied 24*l.* of goods in the poſſeſſion of the defendant's father; the defendant brought trover againſt the plaintiff, pretending the goods were his, becauſe the landlord had ſeiſed them for rent, and ſold them to him; but on evidence, the ſale was proved fraudulent, and that the father was in poſſeſſion all along, and paid taxes for the farm and goods, *&c.* and therefore the judge gave directions to the jury to find for the defendant at law; but becauſe he had not proved a copy of the judgment, as it was held he ought, for that only reaſon the jury found againſt him; and now he brought this bill for relief, and a demurrer to it on arguing was overruled; then by anſwer he inſiſted on his property under the bill of ſale, and recovery at law, where the matter is properly triable, and relied on that, without examining any witneſſes; but the plaintiff fully proved his caſe as before, and that the judge altered his directions only for want of proof of the judgment, and diſproved the * defendant's anſwer in ſome particulars, and a perpetual injunction was granted againſt the judgment, and the defendant to pay coſts; for though it were examinable at law,

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law, ſo it was in equity, and the plaintiff having ſet out the whole matter, and proved it to be true, if it were untrue, the defendant might have diſproved it.

Callow *verſus* Mince. Caſe 197.

2 Vern. 472. S. C. 1 Eq. abr. 223. 12. 2 Eq. abr. 396, c. 2. S. C.

A witneſs incompetent being intereſted, may on a releaſe given him, whereby he becomes diſintereſted, be examined again: ſo a witneſs at the hearing rejected to be read, becauſe intereſted; yet on a releaſe given was examined again on the account, and allowed good on exceptions to a Maſter's report.

THE plaintiff examined a witneſs before the hearing, who was then intereſted, and therefore refuſed to be read; at the hearing the cauſe, the plaintiff was decreed to account, and then he gave a releaſe to the witneſs, and examined her over again to the ſame matter without order of the court; and on exception to the Maſter's report, and offering to read the ſaid witneſs, the defendant objected, that having been examined when ſhe was not indifferent, ſhe could never be made an indifferent witneſs, becauſe oath would always be a chain and bias upon her; beſides, no witneſs ought to be twice examined to the ſame matter, without ſpecial order of the court: to which it was anſwered, then the defendant ought to have moved to ſuppreſs the depoſition for want of an order to examine her, but could not object it, when the depoſition came to be read; and as to the firſt part of the objection, it was ſaid, at law, if I examine a witneſs at a trial, who is incompetent, and after give him a releaſe, he may be examined again; ſo here.

My Lord Keeper was of opinion for the plaintiff in both, and ſo the witneſs was read, and prevailed.

*DE

Termino S. Hillarii,

1704.

In Curia Cancellariæ.

Caſe 198.

Clavering *verſus* Clavering.

Eq. abr. 24, pl. 6. S. C. 2 Vern. 473. S. C. more fully ſtated. 1 Vern. 101. 464. 1 Wms. 577. 2 Wms. 388. S. C. but not S. P. 1 Atk. 625.

A father in 1684 makes a voluntary ſettlement on his eldeſt ſon and his heirs, without any power of revocation; and after made another ſettlement of the ſame lands to his ſecond ſon for life, with remainder to his firſt and other ſons in tail male, and dies.

† A Father in 1684 makes a voluntary ſettlement on his eldeſt ſon and his heirs, with a charge in favour of his ſecond ſon, without any power of revocation; after he makes another ſettlement of the ſame lands to his ſecond ſon for life, with remainder to his firſt and other ſons in tail male, and dies. The firſt deed after his death came to the hands of his eldeſt ſon's heir; and the other deed to the hands of the ſecond ſon, who brought a bill to ſet aſide the firſt.

to his firſt and other ſons in tail male, and dies. The firſt deed comes to the heir of the eldeſt ſon; and the other to the ſecond ſon, who brought a bill to ſet aſide the firſt: but *per Cur.* both deeds being voluntary, the proviſion for a younger ſon is no ſuch conſideration, as to induce the court to ſet aſide the firſt deed.

2 Eq. abr. 52, pl. 5. S. C.

My Lord Keeper cited Lady *Hudſon*'s caſe, where a father, on a quarrel with his eldeſt ſon, made a ſettlement on his

† The decree in this caſe was appealed from to the Houſe of Lords, and affirmed, 1 Brown's Parl. Caſes, 122.

wife of 100 *l. per ann.* in augmentation of her jointure, and after being reconciled to his ſon, cancelled the ſaid deed, and ſo it was found at his death; and on a trial at law the deed being proved to have been executed, was adjudged good, though cancelled; and the ſon on a bill brought here, was diſmiſſed by my Lord *Somers*.

* *Dobyns* ſaid, this court goes on preſumptions in family ſettlements; and if one gives a daughter 1000 *l.* legacy, and after on marriage gives her 1000 *l.* portion, this ſhall here be a ſatisfaction of the legacy; ſo if one owes his child a ſum of money, and by will gives him a greater, this ſhall be here taken for ſatisfaction. 236

† Atkinſon *verſus* Webb. Caſe 199.

2 Vern. 478. S. C. 1 Eq. abr. 203, c. 3. S. C. Salk. 155. 508. 1 Wms. 408. 2 Wms. 343. 553. 1 Vezey, 263. 519. 2 Atk. 300. 491. 3 Atk. 96. Brown's Rep. 170. See alſo, 1 Atk. 426.

THE plaintiff having ſerved the Lady *Pratt* 25 years, as chambermaid and woman, and being much in her favour, and married to the plaintiff by her encouragement, the ſaid lady gives her a bond of 300 *l.* conditioned to pay her and her huſband 20 *l. per ann.* during their lives, and the life of the longeſt liver of them, payable quarterly at Sir *Francis Child*'s ſhop, free from all deductions; and this was conſtantly paid.

A. gives bond to *B.* of 300 *l.* conditioned to pay 20 *l. per ann.* for life quarterly, without any deduction; the like annuity of 20 *l. per ann.* afterwards given by *A.* by will to *B.* payable half-yearly, and without ſuch deduction, held no ſatisfaction.

About five years after, the ſaid lady by will deviſes ſeveral annuities to ſeveral perſons, in ſatisfaction of the like annuities ſecured to them by bond; and gives 20 *l. per ann.* to the plaintiff, to be paid half-yearly at the ſaid lady's manſion-houſe, *chargeable on ſuch lands*; but takes no notice of the 20 *l. per ann.* ſecured to her by bond.

† The caſes touching the doctrine of ſatisfaction, as to legacies, proviſions, portions, &c. are arranged under three heads. 1ſt, Reſpecting relations or ſtrangers. 2dly, Baron and feme. 3dly, Parent and child.
The firſt claſs of authorities are referred to under the above caſe: the ſecond, Poſt, 240: the third, Poſt, 263.

On the circumſtances of this caſe, the court decreed her both, for that given by the will was not ſo advantageous to the plaintiff as the other, one being to be paid quarterly, the other half-yearly; the one here, † *the other on the land*; one free from all deductions, *the other being out of land will be liable to taxes*; and a *deviſe implies a bounty*; and thoſe that were intended in ſatisfaction of the like annuities *are ſo declared in the will, which this is not.*

† Poſt, 294. 2 Wms. 616. S. R. 3 Wms. 226. 247. S. R. 1 Atk. 428. S. R.

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Caſe 200.

* Acton *verſus* Acton.

Antè, 41. 2 Vern. 480. S. C. 290. S. P. Eq. abr. 63, pl. 5. S. C. 2 Wms. 243.

A man before marriage gives bond to the woman to leave her 1000 *l.* if ſhe ſurvives him, and then marries her, and dies inteſtate, and his eſtate, both free and copyhold, being all in mortgage, ſhe takes out adminiſtration, and on bill againſt the heir and mortgagee was let into a redemption of the whole, though the bond was releaſed and gone at law by the intermarriage, and though the copyhold not affected by the bond, *it being in nature of a marriage agreement.*

THE plaintiff's huſband before marriage gives her a bond to leave her 1000 *l.* if ſhe ſurvived him, and the ſame day marries her; and ſome years after dies inteſtate, leaving a freehold and copyhold eſtate all in mortgage.

The plaintiff takes out adminiſtration, but the perſonal eſtate not being near ſufficient to ſatisfy the ſaid bond, ſhe brings her bill againſt the heir and mortgagee to redeem, and be let in to have ſatisfaction of the ſaid bond.

The defendant, the heir, urged, that by the marriage the bond became void in law, and could not be maintained here, eſpecially againſt him, who is chargeable only in ſuch caſe by being ſpecially named; and though it would be ſupported as a marriage agreement in writing, yet could only charge the perſonal eſtate; and that, however, it cannot affect the copyhold.

On the other ſide it was ſaid, this was once a good bond, and the heirs are bound in it; and though by the marriage it loſt its force in point of law, yet in equity it will have the ſame force as before, and bind the huſband, and entitle the plaintiff to a redemption; as if the obligee loſes his bond, yet equity will ſet it up, and give him the ſame advantage of it, as if it were in being; and if equity does ſupport it, it muſt ſupport it, not only

as an agreement in writing, but as a bond, and therefore the plaintiff ought to have the redemption as a bond creditor would have had; and though it was agreed, it would not entitle her to redeem the copyhold, if mortgaged by itſelf, yet when that and the freehold are * mortgaged together, ſhe muſt redeem the whole, 238
and cannot redeem by parcels; and though the heir on payment of what is due on the mortgage will have back the copyhold from us, yet we ſhall hold the freehold till ſatisfied the bond.

Lord Keeper ſaid, if the bond were executed (which being doubtful was ordered to be tried) the court would ſupport it as a bond; and that the freehold and copyhold being mortgaged together, the plaintiff ſhould redeem both.

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De Termino Paſchæ, 1705.

In Curia Cancellariæ.

Caſe 201. **Lord Rockingham and Arabella Oxendon *verſus* Sir James Oxendon.**

Gilb. Rep. 1. Eq. abr. 67, pl. 6. S. C. 1 Vern. 53. 2 Vern. 493. S. C. 671. 1 Wms. 177. S. C. but not S. P. 2 Atk. 96. Poſt, 499.

By articles of marriage 6000 *l.* of the wife's portion was to be laid out in a purchaſe of lands to be ſettled on the huſband for life, then on the wife for life, and to lie in the Bank till the purchaſe made; before that made the wife, by the uſage of her huſband, being forced to leave him, had the intereſt of this money allowed her in nature of alimony.

BY articles on the marriage of the plaintiff, the Lady *Oxendon*, with the defendant, 6000 *l.* part of her fortune, was agreed to be laid out in lands, and ſettled to him for life, then to her for life, *&c.* and was left in the Bank till the purchaſe could be made ſubject to the ſaid truſt.

The lady being after, by his cruel and unhandſome uſage, forced to leave him, brought her bill to have a performance of the articles, and a ſeparate maintenance whilſt ſhe lived from him, which was oppoſed, and ſaid, that alimony was only to be ſued for in the Spiritual Court, and to decree it here would be to decree a divorce.

On the other ſide it was ſaid, that the Spiritual Court has no original and proper juriſdiction of alimony, but only incidentally,

240 and conſequentially when they hold * plea of divorce, whereof they have

have proper jurisdiction; and if it had, yet the Chancery has a concurrent jurisdiction, as with the Admiralty and other courts in cases peculiar to their jurisdiction, and to decree alimony here is not to decree a separation; for if he thinks she left him without just cause, he may sue in the Spiritual Court for restitution of conjugal duties; and if he prevails, the separate maintenance will cease.

My Lord Keeper and Master of the Rolls said, they would not declare where this court would give separate maintenance, and where not, but here being trust money, over which the court has a power, they decreed the 6000*l.* to be laid out with the lady's consent in a purchase, and settled pursuant to the articles, and the interest in the mean time to be paid her so long as she lived separate.

Brown *versus* Dawson. Case 202.

1 Eq. abr. 203, pl. 1. S. C. 2 Vern. 498. 555. 709. 724. 1 Wms. 324. 3 Wms. 353. 1 Vezey, 323. 3 Atk. 419. 5 Brown's Parl. Cases, 567. 7 vol. ib. 12.—*è contrà*, 2 Vern. 505. 2 Wms. 614. 3 Wms. 356. 2 Vezey, 409. Brown's Rep. 129 †. 2. Bro. 95.

A wife parts with 14*l. per ann.* of her jointure, and the husband gives her a note that his executors should pay her that sum during life, and he after by will gives her 14*l. per ann.* out of certain lands for life, held a satisfaction of the note.

Henry Dawson had prevailed on his wife to join in selling 7*l.* 10*s. per ann.* of her jointure, and after 6*l.* 10*s. per ann.* more, and having given two several notes, that his executors should pay her the said two several sums during life, he

after

† The most recent authority is that of *Devese* v. *Pontet* & al', determined at the Rolls, Mich. Term, *Nov.* 15th, 1785.

Felix Devese in 1768 covenanted by marriage articles, that in case *Barbara*, his then intended wife, should survive him, and there should be no issue of the marriage, that his heirs, executors, or administrators, should, within *nine months* after his death, pay her 800*l.* to be for her own proper use and benefit, and at her own disposal; but in case there should be any child or children born of the said marriage, that the interest thereof should be paid to her for her life, and after her decease that the principal should be paid or divided to and among such child or children, &c.

In 1781 the said *F. D.* made his will, and thereby (*inter al'*) after bequeathing several specific articles to his wife *Barbara Devese*, directed, that all the debts due to the business which he then carried on should be collected as soon as possible; that the stock in trade and household goods should be valued, and the money that should be in the public funds, and the produce of all being collected, he desired that it should be divided in *two equal shares*; the one *to be the property of his dear beloved wife Barbara*, for her *to dispose of as she pleased*; the other to be devolved to his dear beloved brother *Peter Devese* (since deceased) appointing him his heir general.

The

after makes his will, and thereby gives her 14*l. per ann.* during life, out of certain lands, and this was held *per Curiam* to be in ſatisfaction of the notes.

The teſtator died ſome time afterwards without iſſue.

The bill was filed by *Mary Deveſe*, the widow and adminiſtratrix of the ſaid *Peter Deveſe*, againſt *Barbara Deveſe*, the teſtator's widow, and other neceſſary parties.

The queſtion was, Whether the diſpoſition under the will ſhould be held as a *performance* or *ſatiſaction* of the covenant in the marriage articles?

Maſter of the Rolls. How far this caſe can be conſtrued a *performance* muſt be conſidered from the terms of the covenant *to pay* 800*l. in nine months*; but I cannot ſee how *giving her certain ſpecific articles*, or *directing the payment of one half of the reſidue of his goods*, can be held to be *a legal performance* of the *covenant*.

In *Blandy* v. *Widmore* (1 Wms. 324.) the principle is laid down (whether right or not) that it was *a performance* in ſpecie: Lord *Hardwicke* proceeded on this ground in *Lee* v. *D'Aranda* (1 Vezey, 1.); and in *Barret* v. *Beckford* (1 Vezey, 579.) where he alludes to that caſe, and ſuppoſes that he is deciding upon the ſame principle, making uſe of this expreſſion, "*this is actual payment and performance.*" Preſuming the deciſion of thoſe caſes proceeded upon a principle not applicable to the preſent, I ſhould have no doubt in paſſing them by, conſidering this caſe not to be a *performance*.

With reſpect to its being a *ſatisfaction* in moſt of the modern authorities, and ſince the principle of *ſatisfaction* was eſtabliſhed, the court has regretted that the caſes have been carried ſo far. The rule ſhould be adhered to as laid down by a very great judge, Lord *Somers*, in *Goodfellow* v. *Burchett* (2 Vern. 298.) who obſerved, that caſes of this nature depend upon circumſtances, and when a legacy has been decreed a ſatisfaction, it muſt be grounded upon ſome *expreſs evidence*, or at leaſt *a ſtrong preſumption*, that the teſtator *intended* it as ſuch. In *Lechmere* v. Lord *Carliſle* (3 Wms. 225.) Sir *J. Jekyl* held that the *intention* ought to be the guide; adopting this rule, as unequivocally laid down by Lord *Somers*, I cannot find any *expreſs evidence*, or *ſtrong preſumption*, that this was *intended* as a *ſatisfaction*.

If this opinion interfered with the diſpoſition of the will, I ſhould yield to the argument, but I think that it does not, for I cannot ſay *that he had it in contemplation to ſatisfy the covenant*. A further argument ariſes from conſidering what this covenant is; it is that 800*l.* ſhould be paid to his wife within nine months, and then a further covenant, that in caſe there ſhould be iſſue, that there ſhould be a proviſion for them. Had the teſtator intended to perform this covenant, it is unreaſonable to preſume he meant to do ſo *in toto*. Suppoſe the wife had been *enſeint*, this will would not have provided for that event. Here at leaſt is a circumſtance which renders it doubtful whether he intended it as a ſatisfaction; and I muſt ſay with Lord *Thurlow*, in *Haynes* v. *Mico*, (Brown, 129.) "*if the queſtion was put to me to ſay, whether this was ſo intended, I dare not ſay ſo.*"

Suppoſe an account gone into, and after the expence and delay occaſioned thereby, the ſurplus ſhould be equal to the ſum covenanted to be paid, would this be a ſatisfaction? If the moiety of a general reſidue will not be a ſatisfaction, how does this differ?

Upon the general principle laid down by Lord *Somers*, and the idea that the court has regretted that the caſes have been carried ſo far, and that an aliquot part of *a reſidue ſhall not be deemed a ſatisfaction*, in concurrence with the authority of Lord *Thurlow*, I am of opinion *that this is not a ſatisfaction* for what the wife is entitled to under the marriage articles.

Lord

* Lord Dudley and Ward, an infant, by the Honourable Thomas Newport, *verſus* the Lady Dowager Dudley, &c. & econt'.

Antè, 65. 95. 151. Poſt, 336. Caſes temp. Talbot, 140.

A dowreſs ſhall have the truſt of a ſatisfied term removed againſt the heir at law.

THE caſe is this, *Edward* Lord *Dudley and Ward*, the plaintiff's great grandfather, being ſeiſed in fee of the honor, manor, caſtle, and borough of *Dudley*, in *Com. Stafford*, and of an eſtate in *Stafford* and *Worceſter* of a great yearly value, by leaſe and releaſe, dated 21ſt and 22d of *March* 1700, did, in conſideration of natural love and affection towards his grand-child *Edward Ward*, Eſquire (the plaintiff's father) ſon and heir of *William Ward*, eldeſt ſon of the ſaid Lord *Dudley*; *Frances Ward* and *William Ward*, ſon and daughter of *Ferdinando Dudley Ward*, ſecond ſon of the ſaid Lord *Dudley Ward*; *Frances Porter* and *Catharine Porter*, grand-children to his brother *William Ward*, party to the deed, and for raiſing portions for them, and for ſettling his lands in his name and blood; convey to *William Ward*, ſenior, and *William Dilkes*, defendants, to the uſe, *&c.* of the ſaid Lord *Edward*, the great grandfather, for life, and then to the defendants *William Ward* and *Dilkes* for 99 years, then to the ſaid Lord *Dudley*, the great grandfather, and his heirs male of his body, and for default, *&c.* to *William Ward* and *Dilkes* for 100 years, remainder to the ſaid *William Ward*, ſenior, in tail, remainder to the right heirs of the ſaid *Edward* the grandfather.

The term for 99 years was thereby declared to be in truſt, that *William Ward* and *Dilkes* ſhould, out of the rents, iſſues, and profits, *&c.* levy, raiſe, and pay 2000 *l.* for the portion of *Frances*, payable at 18, and 50 *l.* yearly maintenance, till the portion paid; to raiſe, levy, and pay 300 *l.* apiece to *Catharine* and *Frances Porter*, and annuities of 120 *l.* apiece to the defendants *Ferdinando* and *William Ward*, junior, for their ſeveral * lives; and 300 *l. per ann.* to the plaintiff's late father, *Edward* Lord *Dudley*, for his ſupport and maintenance, payable half-yearly,

 till

till the expiration or determination of the ſaid term. Theſe annuities to ariſe and begin to be paid after the death of the ſaid Lord *Dudley*; and that the truſtees ſhould have all the charges and coſts they ſhould be at paid them out of the truſt eſtate.

Then follows this clauſe. And may, ſhall, and will permit the perſon and perſons, who from time to time ſhall have right to the freehold of the premiſſes, by virtue of, or under any uſe herein before limited or declared, from time to time, to have, receive, and take, to his and their own uſe and benefit, the reſidue of the rents and profits which ſhall remain over and above, or after the p rformance of the ſaid truſts, *&c.*

Then follows a proviſo, That if the perſon or perſons that ſhall have right to the freehold, *&c.* ſhall pay or depoſit the 2000*l.* or ſo much as ſhall be unlevied, *&c.* and ſhall, to the good liking of the truſtees, ſecure the payment of the ſaid ſeveral annuities and payments, then the term to ceaſe, determine, and be void.

The Maſter of the Rolls' argument and reſolution.

I need not mention the truſt of the term for 100 years, for the augmentation of *Frances*'s portion, being out of the caſe, that being to ariſe upon failure of iſſue male of the ſaid Lord *Dudley*, the great grandfather, nor the power of revocation to the ſaid Lord *Edward Dudley*, for there was not any revocation.

The Lord *Edward Dudley*, the grandfather, made his will, 28th of *June*, 1701, and deviſed the guardianſhip of the plaintiff's father to the defendant *William Ward*, ſenior, his brother, and the guardianſhip of *William Ward*, junior, and *Frances Ward*, the defendants, to him and the defendant *Hodgett*; and thereby gave ſeveral ſmall legacies, and gave all the reſidue of his perſonal eſtate to the plaintiff's father (Lord *Edward Dudley*) and made him and Mr. *Hodgett* executors, but Mr. *Hodgett* was to reap no benefit thereof, and died 30th of * *Auguſt* 1701; that the defendants *William Ward* and *Dilkes* entered upon all the truſt lands.

243

The

The plaintiff's father afterwards married the Lady *Diana*, the plaintiff in the croſs bill, and died 20th of *March*, 1704, under age, and left the lady *enſeint* with the plaintiff, who is ſon and heir to his father, and heir at law to his grandfather, and as ſuch is entitled to the ſurplus of the rents of the truſt eſtate in Mr. *Ward* and Mr. *Dilkes*, and the benefit of the term for 99 years.

The Lady *Diana*, after the death of her huſband, brought her writ of dower, to which the term for 99 years was pleaded in bar; but ſhe had judgment in dower, with a *Ceſſet Executio* during the term.

Edward Lord *Dudley and Ward*, the plaintiff's father, made the Lord *Somers* and the Lady *Diana Howard* executors, until the Lady *Diana* attains her full age, in truſt for her; the Lady *Diana Howard* has proved the will, and alſo taken adminiſtration *de bonis non* to *Edward* Lord *Dudley*, the great grandfather, with the will annexed.

The great queſtion contended between the mother and the ſon (for the other demands on both ſides, will, I preſume, eaſily be determined) is, whether the lady dowager, the plaintiff in the croſs bill, ſhall have the benefit of the truſt of the term, as to a third part of the profits above the charge of the annuities, during their reſpective continuance, and after the determination, a third part of the whole profits as her dower.

And as this caſe is, I am of opinion ſhe ought. Before I proceed, I muſt declare, that I intend not in the leaſt to enervate the decree of diſmiſſion in the † Lady *Bodmyn* and *Vandebendies*'s caſe, which ſtands confirmed in the Houſe of Lords; but to diſtinguiſh this preſent caſe out of the reaſon and judgment of that decree, agreeing that it ought to ſtand for ever in this court.

† Show. Parl. Caſes, 69.

I obſerve this term is expreſsly attending and waiting on the freehold and inheritance, nay, waiting during * the very charge, and the charge of the annuities, as to the ſurplus of the profits. 244

My

My reaſoning ſhall be drawn from the original inſtitution of this court of equity and conſcience; and alſo from the rules and common law principles of that which is regular law, which is bound to rules, to which equity in general may be ſaid to be oppoſite: for all kingdoms in their conſtitution, ſays my Lord *Hobart*, are with the power of juſtice, both according to the rule of law and equity. Theſe are the grounds which I ſhall go upon, and not upon any notions or arbitrary rules of my own.

My firſt reaſon is, that the right a dowreſs has to her dower is not only a legal right, ſo adjudged at law, but is alſo a moral right, to be provided for, and to have a maintenance and ſuſtenance out of her huſband's eſtate to live upon; ſhe is therefore in the care of the law, and a favourite of the law; and upon this moral law is the law of *England* founded, as to the right of dower.

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardneſs, and edge of the law, and is an univerſal truth; it does alſo aſſiſt the law where it is defective and weak in the conſtitution (which is the life of the law) and defends the law from crafty evaſions, deluſions, and new ſubtilties, invented and contrived to evade and delude the common law, whereby ſuch as have undoubted right are made remedileſs; and this is the office of equity, to ſupport and protect the common law from ſhifts and crafty contrivances againſt the juſtice of the law. Equity therefore does not deſtroy the law, nor create it, but aſſiſt it.

Now, what is it that hinders the lady from her right? She has obtained judgment in dower at law, the law has given it to her. Ay! but there is a rule of the law entered, called a *Ceſſet Executio*, the effect and power of which ſtops her execution, and
245 the benefit of the * judgment that ſhe has obtained. For how long? During the term of 99 years: A hard injunction; but upon what ground or reaſon? Why, becauſe the common law ſays, her title is the marriage, ſeiſin, actual poſſeſſion, and death of her huſband; and there never was a time, if her lord died, that

that ſhe ſhould have had immediate dower; becauſe this term was a legal intereſt before the marriage, continuing at the time of the death of her huſband, and pleadable in bar by the heir to her demand of dower, and this is the common law.

But notwithſtanding this, I conceive ſhe is relievable, and that this ſtrict rigorous rule of the law ought to be moderated by equity and conſcience, for theſe reaſons, and the precedents hereafter cited:

1ſt, From the nature, end, and deſign of creating this term; by the ſettlement it appears to be created by *Edward* Lord *Dudley*, for making proviſions out of the profits for his ſon and grandchildren, which nature obliges him to take care of; and after that office and truſt performed, the two truſtees are to permit and ſuffer the perſon and perſons, who from time to time ſhall have a right of the freehold of the premiſſes, to receive the reſidue of the profits that ſhall remain after the performance of the truſts.

That perſon was the dowreſs's huſband, who had an undeniable right to the ſurplus of the profits, and had an eſtate tail in him, and the dowreſs under him has a good equity to have her dower, becauſe the truſt of the term was expreſsly to attend the perſon that ſhould have the freehold; and her huſband had the freehold, and ſhe has the freehold, and the words of the declaration of the truſt are thereby literally ſatisfied; though I am of opinion, that if the words had been in general to attend the inheritance, it would have been the ſame thing, and ſhe has a right to this truſt within the deſcription.

It is no ſtrange notion at law, that long terms for years ſhould attend and wait on an inheritance, in which * caſe they 246
are to be governed and directed by the intention of the parties that created them, and who, when they have put an end to them, then they have done their office, duty, and truſt, and have borne the burthen, I mean have raiſed theſe portions, which was the original cauſe of their creation, and therefore in equity and conſcience ought then to ceaſe, and return back to the channel from whence they were extracted; and it is a reaſon in law,

that *ceſſante cauſa ceſſat effectus*, and there is no original conſideration to give them a longer being, and ſuch a term ought not to be made uſe of to any other purpoſe, eſpecially to deprive a dowreſs of her dower.

For the nature of theſe waiting terms, I muſt compare them to covenants, conditions, reſervations, and warranties, which my Lord *Hobart*, in the Earl of *Clanrickard*'s caſe, ſays, do all wait and join to the grants, whereof he there gives ſeveral inſtances, and ſays, that a reſervation of a rent, which is but a ſhadow, muſt be guided by the body, which is the eſtate; why ſhould not in like manner this truſt, which is expreſsly directed to wait upon and join the freehold, which was in the huſband, and alſo in the dowreſs, be guided and directed by the body, which is the freehold and eſtate, and, as in caſe of a reſervation of the rent, which follows the freehold, and is in recompence of the land.

2*dly*, This truſt is an intereſt annexed to the eſtate immediately, as to the ſurplus over and above the charge, and is attending and ancillary to the freehold and inheritance, and this truſt is a right in conſcience to take the ſurplus of the profits, during the continuance of the charge and the annuities, and the whole profits after the charge raiſed and ſatisfied, and does moſt certainly enſue the nature of the land; for what are the profits, but the lands, or what is the land, but the profits? and the lord was ever in poſſeſſion of the land by his guardian and truſtee, and was perfect owner.

247 * There can be no queſtion, but this term does attend the inheritance and freehold; but then the queſtion is, To what purpoſe does it attend? I conceive that it does attend to the ſame purpoſes as an advowſon appendant does to a manor; a commonage appendant to a meſſuage and land; a villain regardant to a manor; any thing that is an acceſſary, and that follows the nature and condition of the principal: nay, it is, as the logicians term it, *adjunctum ſubjecti*, an adjunct or quality adjoined, or rather re-annexed to its ſubject in the perſon of the owner of the freehold; but in ſome caſes it ſeems to be merged

merged or confounded in equity, for it is aſſets ſubject to a debtor; and is not dower a debt, and out of the land too?

And therefore my Lord *Hale*, in Sir *John Saunders*'s caſe, *Mich.* 20. *Car.* 2. is of opinion, that ſuch a waiting term does not prevent dower, or ought to ſtave off a debt; for ſuch a term ſhall be aſſets, ſays he, if it attend an inheritance in fee ſimple; but not, if it attend an eſtate tail, which is not ſubject to debts in equity; but here the lord has an eſtate tail, to which dower is incident, and therefore ſhall attend the dower.

And in Sir *George Saunders*'s caſe it was adjudged, that a waiting term in truſt follows the eſtate, as the ſhadow does the body, and is of the ſame nature and quality, and it is there compared to a box of writings which follows the land.

The dowreſs here ought to be regarded as a purchaſer, conſidering her portion, her quality, a match no way unequal, a marriage treated, no ill method or practice uſed, looked upon by good and learned counſel to be dowable, the young couple being young, under age, and unwilling to ſtay till age to make a ſettlement, and above all, no debts or portions on the eſtate, but two or three annuities.

Again, ſhe ought to be preferred to the heir her ſon; 1ſt, Becauſe her right (though it may be ſaid concurrent) is prior in time to the heir, it began by the intermarriage. * 2dly, 248
That the heir loſes (if I may call it ſo) but one third to his mother for her dower, and retains two thirds to himſelf, which is not unreaſonable.

3*dly*, The courts of law, though ſhe has judgment, cannot aſſiſt her againſt this term, becauſe, being a truſt, they have no cognizance of it, and is a creature of this court, and only determinable here; and without the aſſiſtance and relief of this court the judgment for dower is enervated and eluded by the *Ceſſet Executio*, for by the judgment ſhe has dower, and by the *Ceſſet* ſhe is prevented, during the term of 99 years; and it is moſt probable that ſhe will not outlive the 99 years, without which ſhe cannot have benefit of her judgment, and all the

remedy at law is vain and illuſory, and no remedy any where but here; and yet her right is fixed and unfixed by the judgment at law, and right without a remedy is nothing; and therefore I hold the common law to be defective in this caſe as to the execution, and ought to be aſſiſted by equity.

But to conclude this point, as between the dowreſs and the heir, this very caſe is admitted in the very argument of the Lady *Bodmyn* and *Vandenbendy*, for (ſays the printed caſe, *Parliament Caſes*, 71.) it perhaps would be prevalent againſt an heir, but not againſt a purchaſer; and ſo I conclude it to be beyond a perhap.

It is objected here (as in that laſt caſe) that the demand of dower is a right not ariſing by the agreement of the parties (which, if defective or imperfect, might be ſupplied by equity) but by operation of law: now I preſume the difference is meant between a defective jointure and dower; but I conceive that it is a diſtinction without a difference, in words only, not in ſenſe, and a marriage is as much a contract (and I am ſure more ſacred) and ought to be as much regarded and relieved, as a defective jointure, which is the agreement of the parties: the diſtinction is commonly expreſſed in *Latin*; dower is *ex proviſione legis*, a jointure, *ex proviſione hominis*; but each of
249 them is but a proviſion for the * wife, and that the law makes ought to be regarded, and ſupported by equity preferable to the other; they are both grounded upon contracts, as my Lord Chancellor *Jefferies* ſays, in the report of Lady *Radnor*'s caſe, and he could not imagine a reaſon why a jointreſs ſhould be relieved againſt ſuch a waiting term, and not a dowreſs; it is there alſo agreed, that if a leaſe be made precedent to a marriage, in truſt to pay debts, the heir paying the debts ſhall be relieved againſt the leaſe, and ſet it aſide, why not the dowreſs? I think ſo too.

I ſhall now give an anſwer to the judgment in my Lady *Bodmyn*'s and *Vandenbendy*'s caſe, which is cited to over-rule this caſe in point.

I conceive

I conceive that caſe purely to have been decreed in favour of a purchaſer, and the ſtrength of it to be grounded on the general inconveniences that would attend all purchaſers, *bonâ fide*, without notice, which was the point my Lord *Jefferies* and *Somers* went upon, and for which occaſion was cited the caſe of *Baſſet* verſus *Noſworthy*, 26 *Car.* 2. in Lord *Nottingham*'s time, which was thus: *Noſworthy* pleaded himſelf a purchaſer for valuable conſideration without notice, which plea being proved, came to be heard upon the merits, and the Lord Chancellor declared, That a purchaſer, *bonâ fide*, and without notice of any defect in his title at the time of his purchaſe, may lawfully buy in any ſtatute mortgage, or any other incumbrance; and if he can defend himſelf by thoſe at law, his adverſary ſhall have no help in equity to ſet thoſe incumbrances aſide, for equity will not diſarm a purchaſer; and precedents of this kind are very ancient and numerous, where the court has refuſed to give any aſſiſtance againſt the purchaſer, either to the heir, or to the widow, the fatherleſs, or to the creditors, or to one purchaſer againſt another; and this rule in Chancery is in vindication of the common law, where the maxims which refer to deſcents, diſcontinuances, non-claims, and collateral warranties * are only the wiſe arts and inventions of the law to protect and quiet the poſſeſſion, and ſtrengthen the right of purchaſers, *&c.* 250

I have cited theſe reaſons at large, becauſe it ſtrengthens the judgment in *Vandenbendy*'s caſe, and let all ſuch purchaſers be ſupported and protected; but ſurely the precedents in this caſe will not ſupport the heir in our caſe againſt another that demands her dower.

As to the precedents, I ſhall mention ſome that weigh with me, beſides the natural juſtice of the caſe.

The firſt I ſhall make uſe of is † *Fletcher* and *Robinſon*'s caſe, 6 *May*, 1653. *Henry Robinſon*, on good conſideration, promiſed to aſſure the manor of *Buckton* to his eldeſt ſon in fee; but falling into ſome trouble for counterfeiting a warrant, he conveyed *Buckton* to his younger ſon, in truſt, only to ſecure it againſt a

† Vid. this caſe, cited from the Regiſter's Book by Sir *J. Jekyll*, in *Banks* verſus *Sutton*, 2 Wms. 642.

forfeiture. The father being freed from trouble, conveyed *Buckton* to his eldeſt ſon, and dies: the eldeſt ſon dies and leaves a widow, having no iſſue, and the younger brother his heir; on dower brought by her, the conveyance to the younger brother was given in evidence, whereupon ſhe was nonſuited; but upon a bill brought by her here, the caſe appearing *ut ſupra*, ſhe had a decree, and a commiſſion directed to ſet out the thirds; and though this was much conteſted, yet equity and juſtice prevailed; and though the time in which this was adjudged may be objected, yet † *were they learned men*, who deliberated well, and pronounced their decrees and judgments according to their oaths, and according to juſtice and equity.

Serjeant *Vaughan*'s caſe is in point; and *Snell* and *Clay*'s caſe, which was heard 6 *W.* and *M.*

The common law is, that if a rent be reſerved on a leaſe for years, made precedent to marriage, the wife ſhall recover dower of the third part of the rent immediately, and alſo of the land, with a *Ceſſet Executio durant. Termino.*

251 * Why then ſhould not the declaration of the ſurplus of the profits to the next perſon to whom the freehold ſhall come be looked upon in conſtruction to be a reſervation of rent, as it is in effect and in intention, and ſo to be conſtrued in equity to aſſiſt a right of dower; for a rent is certainly part of the profit of the land, and is paid therewith, why ſhould not this ſupply a reſervation in equity?

I think I have law and equity on my ſide, and likewiſe the precedents, which, according to my Lord *Hobart*, 270. are built upon reaſon and juſtice, and *tantum habent de lege, quantum habent de juſtitia*; I muſt therefore decree the lady dowager the benefit of this truſt term, and that the truſtees, Mr. *Ward* and Mr. *Dilkes*, do account to her for the third part of the clear profits, above the charge of any yearly annuities, from the death of her huſband, and from time to time for the future during the term, and the term to ſtand charged therewith during her life; the truſtees to be allowed their coſts and charges according to

† *Widdrington*, *Whitlock*, and *Liſle*, were at that period Commiſſioners of the Great Seal.

the

the deed, and to be indemnified, and coſts to be paid to the plaintiff, the lady, and all the defendants, out of the truſt eſtate.

Franklyn *verſus* Earl of Burlington. Caſe 204.

2 Vern. 512. S. C. 1 Eq. abr. 200, pl. 7. Antè, 207. and references.

Richard Earl of *Burlington*, in 1697, deviſes thus: *Item*, My will and pleaſure is, that the furniture and pictures in my houſes at *A. B.* and *C.* ſhall always remain there, and not in the power of my executors to diſpoſe of, but ſhall go with my ſaid houſes to ſuch of my grandchildren as ſhall be in the poſſeſſion thereof; and then appoints, that the plate, gilt with gold, belonging to his chapel at, *&c.* together with the ornaments thereof, ſhould remain to the perpetual uſe of the ſaid chapel, and makes *D.* executor, to whom he gives all his perſonal eſtate, except what is before bequeathed, of what nature or kind ſoever.

A deviſe of the furniture and pictures at the houſes at *A. B.* and *C.* paſſes not plate, which the teſtator conſtantly uſed, and removed with him when he went from one houſe to another.

* The queſtion was, Whether the plate the teſtator conſtantly uſed, and removed with him when he went from one houſe to another, ſhould go to the executor by the laſt clauſe, or belong to the houſes under the word *furniture*? 252

My Lord Keeper was of opinion, that the word furniture in a large ſenſe takes in plate, but not here, becauſe he diſtinguiſhes the chapel plate from the furniture; and the plate of ordinary uſe that was carried with him, would no more be ſaid the furniture of one than of the others, and he meant only the particular furniture of each houſe; ſo the plate went to his executors, and liable to the plaintiffs, who were creditors.

Tilly *verſus* Bridges. Caſe 205.

MY Lord Keeper was of opinion in this caſe, that when one has title to the poſſeſſion of lands, and makes an entry, whereby he becomes entitled to recover damages at law, for the time the poſſeſſion was detained from him after ſuch entry, he ſhall not turn that action at law into a ſuit of equity, and bring a bill for an account of the profits, except in † *caſe of an infant*, or ſome other very particular circumſtances.

1 Eq. abr. 285, pl. 2. 2 Vern. 519. S.C. differently ſtated. 2 Eq. abr. 588. S. C. Poſt, 516.

† 2 Wms. 645.

Caſe 206. **Beſt *verſus* Stampford.**

Gilb. Ch. 253. 1 Eq. abr. 241, pl. 1. 274, pl. 8. S. C. 1 Vern. 43. 188. 2 Vern. 1 and 52. 520. S. C. 1 Salk. 154. S. C. 2 Freeman, 288. S. C. 2 Wms. 236. 3 Wms. 330.—See alſo, 1 Wms. 360. Brown's Rep. 70.

Feme inheritrix raiſes a term for 1000 years, in truſt for the huſband for life, then for their children (if any) their executors and adminiſtrators; and if the wife ſurvives, in truſt for her, her executors and adminiſtrators.

A Feme inheritrix before marriage raiſes a term for 1000 years, in truſt for her intended huſband to receive the profits during their joint lives; and if they ſhall have any children, in truſt for ſuch children, their executors and adminiſtrators, during the reſt of the term; and if the huſband ſurvive her, in truſt for him, during his life; but if ſhe ſurvive him, * then in truſt for her, her executors and adminiſtrators, during the reſt of the term.

The huſband dies without iſſue; the wife marries a ſecond huſband, and dies; the huſband takes out adminiſtration to her, yet decreed that the term ſhould attend the inheritance.

253 The huſband dies without children, and the wife ſurvives, and takes another huſband, who ſurvives, and takes out adminiſtration to her.

The queſtion was, If the ſaid term ſhould go to him, or attend the inheritance, and go to the heir?

Lord Keeper. This is only an unſkilful declaration, and not the intent of the party; and the particular purpoſe being ſerved, it muſt attend the inheritance, for ſo I think it was at her ſecond marriage, and that could not be altered by her death, for *equitas ſequitur legem*, and cited *Pollhill* and *Pollhill*; and *if the term and inheritance had been in the ſame hands, it would have merged, ſo here it ſhall be attendant in equity.*

Termino S. Hillarii,

1705.

In Curia Cancellariæ.

Parrot *verſus* Treby.

Caſe 207.
5 *January*.
1 Eq. abr. 125, pl. 4. S. C.

Where on a bill to call a truſtee to account, he by anſwer ſubmits readily to it, though found in debt, ſhall pay intereſt for the balance only, from the time of the account liquidated, and no coſts; *ſecùs*, if he controverts the account there, if found in arrear, ſhall pay intereſt and coſts.

ON a bill brought to call a truſtee to an account, it was held by my Lord Keeper, that if he by anſwer ſubmits readily to it, though on the account he be found in debt, yet he ſhall pay intereſt for the balance only from the time of the account liquidated, and no coſts, if he has not miſbehaved himſelf; but whereas in this caſe, he ſaid, in his anſwer, he believed the plaintiff conſiderably indebted to him, and after the matter had depended 20 years, is found 200 *l.* in the plaintiff's debt, he ſhall pay intereſt from the time of the bill; for he admits by ſuch anſwer, that he has not kept any money for the plaintiff uſeleſs, or unemployed, and in a manner dares the plaintiff to the account, and therefore muſt pay coſts, as the plaintiff muſt have done if he had been found indebted to him.

255
Caſe 208.

* Gore *verſus* Knight.

1 Eq. abr. 66, pl. 4. S. C. 1 Vern. 245. S. C. 2 Vern. 535. 2 Eq. abr. 149, c. 2. 1 Wms. 126. 2 Wms. 316. 1 Vezey, 303. 518. 2 Vezey, 191. 3 Atk. 695. 709.——Vid. Brown's Rep. 16.

A feme covert, who makes profit of a real or perſonal eſtate, *ſettled to her ſeparate uſe*, may diſpoſe of ſuch profit as ſhe pleaſes.

† WHERE a woman before marriage, by conſent of the man, makes over her eſtate, *real and perſonal, to be at her own diſpoſal*, all the product or increaſe of it, or *that which comes in lieu of it*, ſhall be alſo at her diſpoſal.

† Vide *Powell* v. *Hankey* (2 Wms. 82.) where the wife, *after the death of her huſband, was not permitted to recover the arrears of her ſeparate intereſt.*

DE

In Curia Cancellariæ.

DE

Termino Paſchæ,

1706.

In Curia Cancellariæ.

Powell *verſus* Bell. Caſe 209.

1 Eq. abr. 60, pl. 7. S. C. 2 Vern. 61. 118. 2 Freeman, 220. Ch. Caſes, 295. 2 Eq. abr. 134, c. 5. S. C. (n.)—See alſo, 1 Wms. 465. 3 Wms. 409. Caſes temp. Talb. 173.

An executrix or adminiſtratrix waſtes the perſonal eſtate, and then marries and dies, the huſband ſhall be chargeable in equity to anſwer it in nature of a debt, ſo far as any fortune of his wife's come to his hands will extend, unleſs he had made a ſettlement on her adequate to that fortune, without notice of the debts or devaſtavits.

THE defendant had married an adminiſtratrix to her former huſband, to a ſhare of whoſe perſonal eſtate the plaintiff was entitled; the adminiſtratrix was likewiſe entitled to a third, and before her ſecond marriage had waſted great part of the eſtate, and then died.

* This bill was brought againſt her huſband to have an account of the eſtate, and a ſatisfaction for his ſhare; and being heard at the Rolls, an account was decreed to be taken of what of the eſtate had come to the hands of the adminiſtratrix before her ſecond marriage; and alſo what had come to her or her huſband's hands ſince the marriage; and the plaintiff to have ſatisfaction againſt the defendant abſolutely, for ſo far as came to his or his wife's hands after marriage; and for what came to her hands before her ſecond marriage, to have a ſatisfaction againſt the

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the defendant, ſo far as he had any eſtate of his wife's; and this was affirmed on appeal to my Lord Keeper.

Mr. *Vernon* ſaid, it has been ſeveral times held, that where a man marries a woman, without ſtipulating for any particular fortune, or making any ſettlement, if, after the death of the wife, debts of hers appear, the huſband (not being a purchaſer in ſuch caſe) ſhall be anſwerable for the debts of the wife in equity, ſo far as he had any money or other perſonal eſtate of hers.

Caſe 210.

† Aſtry *verſus* Aſtry.

1 Rep. 177. 1 Vern. 66. 355. 414. 2 Vern. 513. Caſes temp. Talb. 73. 2 Vezey, 367. 640. Cowper's Rep. 651. Brown's Rep. 450. 2. *Bro.* 22. 51.

If a man gives his wife power to divide his eſtate amongſt his three children, ſhe muſt do it equally.

IN this caſe was cited the caſe of Sir *George Crook*'s daughter, who had left a power to his wife to deviſe her eſtate among his three daughters, in ſuch proportions as ſhe ſhould think fit; yet it was held in this court, that ſhe muſt divide it amongſt them equally, unleſs a good reaſon can be given for doing otherwiſe.

† It has been held, that a parent may execute a power of appointment *unequally*, but not ſo as to be illuſory, 1 Vezey, 59.

* DE

Termino S. Trinitatis,

1706.

In Curia Cancellariæ.

Orby *verſus* Lord Mohun. Caſe 211.

2 Vern. 531. and Gilb. Eq. Rep. 545. S. C. more fully reported. 1 Eq. abr. 343, pl. 5. S. C. p. l. also 2. Chan. Rep. 162.

Tenant for life, with a power to make leaſes of all land anciently demiſed, reſerving the ancient rents, and of the other lands, reſerving the beſt improved rents, makes a general leaſe of all the lands, reſerving rent in the very words of the power. Leaſe adjudged void by the Lord Keeper, and Chief Juſtice *Trevor*, againſt the opinion of *Holt*, Chief Juſtice.

Fitton Gerrard, tenant for life, with power to make leaſes for 21 years, or three lives, ſo as upon every leaſe of ſuch lands as have been uſually letten, and fines taken for them, the old accuſtomed rent, or more, be yearly reſerved, and ſo as upon every leaſe of other lands not uſually letten, nor fines taken for them, there be reſerved the beſt improved rent that can be gotten for the ſame, and the leſſees to execute counterparts thereof.

Fitton Gerrard, by indenture 21 *December* 1702, demiſes to the defendants all ſuch lands as have been uſually letten, and fines taken for them, for 99 years, if three perſons ſhould ſo long live, with a reſervation in theſe words, *yielding and paying therefore*

therefore the reſpective old and accuſtomed yearly rents; and if this reſervation was purſuant to the power, was the queſtion.

258 * My Lord Chancellor, being aſſiſted with the two Chief Juſtices, *Holt* and *Trevor*, decreed, that this leaſe was not good to bind the remainder-man.

But my Lord Chief Juſtice *Holt* differed in opinion, and held this leaſe good.

1*ſt*, Becauſe the reſervation being in the very words of the power, if the power was good, the reſervation muſt be ſo too, for the ſame words muſt have the ſame meaning in both; and if a ſum certain had been reſerved, yet it muſt have been averred to have been the ancient and accuſtomable rent, or more; and therefore this reſervation in the words of the power may be helped by ſuch an averment, and conſequently is good.

2*dly*, That if any of the lands compriſed in this leaſe had not been anciently let, though the reſervation in ſuch manner as to them would be void, yet the leaſe would remain good as to the others.

3*dly*, Though all the lands were compriſed in this one deed of leaſe, yet the remainder-man, who is to have all the deeds in his cuſtody, might eaſily diſtinguiſh them, as well as if they had been let by ſeveral leaſes as they were formerly.

But my Lord Chancellor and *Trevor* held this leaſe void againſt the remainder-man, and not purſuant to the power.

1*ſt*, Becauſe it was intended, that the words of the power ſhould be turned, *verbatim*, into a reſervation in leaſes; and to ſay, that if the words in the power are good, they cannot be bad in the reſervation, ſuppoſe, in the power to make leaſes, it was provided, that in every ſuch leaſe there ſhould be inſerted ſuch covenants as are uſual in leaſes in that county, and a leaſe were made in the very words of the power, would this be good? Certainly not, nor would it be aided by any ſpecial verdict, finding the covenants uſual in that county.

2*dly*,

2*dly*, The queſtion in this caſe is not between the leſſor and leſſee (between whom, perhaps, the leaſe might be good, and the rent recoverable) but the * queſtion is, as to the remainder-man, whoſe remainder and inheritance is to be charged by a power, which is to be taken ſtrictly, and is not purſued; for the intent thereof was, that a certain rent might be reſerved upon every leaſe to be made, that ſo he in remainder might know how to come at it, and from his action for the recovery thereof, which, as this reſervation is, he cannot do, but will be involved in perpetual controverſy and uncertainty, for he muſt not only aver and avow, that the ſum he diſtrains for is the ancient rent, but muſt alſo prove it; for if the tenant can ſhew another more ancient rent, then he may nonſuit the remainder-man, and ſo, *toties quoties*, he diſtrains or avows for any rent the tenant, by ſhewing that another rent has been reſerved may baffle him, and keep the land in ſpite of his teeth, without any rent at all, till he is ſo lucky as to hit upon the true ſum reſerved upon every ſeveral leaſe, which will be very difficult for him in the remainder to do, and is no ways agreeable to the meaning of the power: but if a certain ſum had been reſerved, and the counterpart ſhewn under the tenant's hand, he muſt either ſhew a more ancient rent, or it will be preſumed for the plaintiff; and if he ſhould ſhew one more ancient, the conſequence of that will be the avoiding of his own leaſe, which to imagine he ſhould attempt is abſurd; and without defeating of the leaſe he can never avoid payment of the rent, when it is reſerved in certainty; but as it is reſerved here, it is wholly uncertain; and my Lord Chancellor ſaid, it was the firſt attempt that ever was made to delegate the power generally that was to have been executed particularly, and was a new invention, tending to introduce perjury, forgery, and frauds, and therefore not to be countenanced.

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260
Caſe 212.

* Grice *verſus* Goodwin.

2 Eq. abr. 281, c. 1. S. C.

What ſhall be ſaid, an error appearing in the body of the decree.

John Grice by will deviſes his real eſtate to his wife for life, and after to *Thomas* his ſon for 99 years, if he ſhould ſo long live, charged with the payment of 500 *l.* apiece to *John* and *Thomas*, the two eldeſt ſons of his ſon *Thomas*, at their ages of 21 years, and dies.

Afterwards *John* the grandſon dies, in 1694, an infant, and inteſtate; after, in 1698, *Thomas* the father dies, without taking adminiſtration to *John* his ſon; and a bill was brought to have an account and diſtribution of the perſonal eſtate of *John Grice* the grandfather, *Thomas* the father, and *John* the ſon.

On hearing the cauſe, the court had decreed the 500 *l.* legacy, deviſed to *John* the grandſon, to be diſtributed amongſt his mother, brother, and ſiſters, equally; and a bill of review being brought to reverſe this decree,

A legacy given a child by a ſtranger, at the child's death veſts in the father by the Statute of Diſtributions, although he took not out adminiſtration to ſuch child.

The firſt error aſſigned was, that on the death of *John* the grandſon, in the life of *Thomas* his father, his 500 *l.* legacy veſted in his father by the Statute of Diſtributions, though he took not adminiſtration to him, and therefore ought not to have been diſtributed as the perſonal eſtate of *John* the grandſon, but as the perſonal eſtate of *Thomas* the father, and then the mother would be entitled to a third of it; and it was admitted it ought to have been ſo.

But it was inſiſted, this error did not appear in the body of the decree as drawn up; for though it was laid in the bill, that the grandſon died in 1694, and the father in 1698, and that it is confeſſed in the anſwer they died about the times in the bill, yet the defendants being infants, their admiſſion is not ſufficient
261 unleſs proved; and it ſhall be ſuppoſed it was not proved, * becauſe, if it had, the court could not have made ſuch a decree, and the proofs now cannot be referred to.

On the other ſide it was ſaid, taking the fact to be as appears on the face of the decree, as drawn up and inrolled, it is a plain error, and it muſt be ſo taken now; and the queſtion

is not at preſent, Whether an infant's admiſſion be good or not?

The court held it an error appearing in the body of the decree, ſo the decree was opened.

Lord Bath *verſus* Sherwin. Caſe 113.

Antè, 194. Gilb. Eq. Rep. 2. S. C. 2 Eq. abr. 171, c. 1. S. C. 1 Wms. 672 *. 2 Wms. 564 *. 1 Vezey, 28. 3 Atk. 542. Bunbury, 158 *.

The authorities marked with an aſteriſk are ſuch as where a *new trial* was refuſed.

A Bill was brought for a perpetual injunction, to ſtay the defendant from bringing any more ejectments to try his title at law, ſuggeſting, that the plaintiff had five verdicts, and that it was an unreaſonable vexation, *&c.*; therefore to put his title in perpetual peace, was the end of the bill.

Chancery will not grant a perpetual injunction, though the party has *had five verdicts in ejectments* at law, unleſs there be ſome ingredient in the cauſe, which gives the court juriſdiction, as truſt, fraud, accident, *&c.*

The Lord Keeper, after this had been fully debated, took time to conſider of it, and now delivered his opinion, *viz.* that to give the court an original juriſdiction, there ought to be a fraud, or a truſt, or ſome accident fall out in the caſe, to prevent ſome great inconvenience, as between a lord of a manor and the tenants thereof, to ſettle the ſeveral rights; if in caſe the right between the lord and the ſeveral tenants was to be ſettled in ſeparate actions, the difficulty upon the lord would be inſuperable, by reaſon of the multiplicity of ſuits at law, the like in ſettling boundaries, *&c.*: therefore this court will interpoſe and direct an iſſue to be tried, and the conſcience of the court thereby informed and ſatisfied; this court will then put the whole in peace by a perpetual injunction.

* But this caſe, he ſaid, was in its nature new, and did not fall under the general notion of a bill of peace; this being only between *A.* and *B.* and one man is able to contend againſt another; and if the courts of law on new demiſes will not ſuffer the former verdicts to be pleaded, he could not help it: he ſaid, he was ſatisfied of the vexatiouſneſs of the defendant in this 262

caſe; but if it was a grievance, it was in the law, which was proper for another juriſdiction, *viz.* the parliament, to reform, and that it would be arrogance in him by decrees or injunctions to take upon him the reformation of the law †.

† This decree was appealed from to the Houſe of Lords, and it was reverſed, the injunction being granted. 1 Brown's Parl. Caſes, 266.

*DE 263

Termino S. Mich.

1706.

In Curia Cancellariæ.

Hoſkins *verſus* Hoſkins. Caſe 214.

Antè, 183. Poſt, 541. 2 Freeman, 224. 2 Vern. 114. 255. 646 †. Ventris, 347. 1 Wms. 147. 299. 681. 3 Wms. 225. 315. Caſes temp. Talb. 71. 1 Strange, 235. 1 Atk. 509. 2 Atk. 48. 3 Atk. 77 †.—*è contrà*, 1 Eq. abr. 204, pl. 5 †. 2 Vern. 298. 3 Wms. 226. 2 Atk. 516. 491. 3 Atk. 98.——Brown's Rep. 425.

Thoſe marked thus †, are caſes where *evidence* of the intention was admitted.

SIR *John Hoſkins* by will, amongſt other things, deviſes to his younger ſon *Henry Hoſkins* 750 *l.* and afterwards buys him a cornet of horſe's employment, and paid 650 *l.* for it; and it was proved to be intended this 650 *l.* ſhould be diſcounted out of the legacy, and that he would ſtrike ſo much out of his will, as ſoon as the accounts came from *London* to him; but died before they came, without altering his will.

A. by will gives 750 *l.* to his ſon, and afterward buys him a cornet of horſe's employment for 650 *l.* which ſum (was proved) he intended to ſtrike out of his will: held that the 650 *l.* ſhould go in diminution of the 750 *l.*

Per Curiam. This money paid for the ſaid commiſſion ſhall go in diminution of the legacy, and be taken in payment and ſatisfaction of ſo much.

Another point was, Sir *John* by his ſaid will deviſed the uſe of his houſehold goods to his wife, during her widowhood,

2 Eq. abr. S. C. Antè, 12. 170. 231.

and made her executrix during her widowhood; and if ſhe ſhould die or marry, he appointed his ſon and heir to be his executor: he alſo deviſed ſome curioſities and rarities to remain as heirs looms in his family; and the queſtion was, If the widow, who had this legacy of the uſe of the houſehold goods
264 during her widowhood, ſhould have the * undiſpoſed ſurplus of the perſonal eſtate, or if it ſhould be diſtributed according to the Statute of Diſtributions?

My Lord Keeper was of opinion, as this caſe is, ſhe ſhall have the ſurplus, for ſhe has but a limited executorſhip; and though this court has diſtributed the ſurplus where the executor has a legacy, on a ſuppoſed intention of the teſtator that he intended him no more, yet here it cannot be intended ſo as to exclude the heir when his executorſhip ſhall take place; for as to the heir looms, that appears to be given to another intent, and not to exclude him from the ſurplus, neither ſhall the wife in this caſe be excluded.

Caſe 215.

† Murray *verſus* Wiſe & al'.

1 Rolls abr. 834, pl. 12. 1 Eq. abr. 177, pl. 15. S. C. 2 Eq. abr. 299. 4 and 14. 2 Vern. 564. S. C. 690. 2 Wms. 523. 3 Wms. 295. Caſes temp. Talb. 157. 268. 1 Vezey, 10. 226. 2 Vezey, 48. 2 Atk. 37. 3 Atk. 486. Comyn's Dig. 281. vol. 6. Cowper's, Rep. 299. 657. 7 Brown's Parl. Caſes, 467. S. C. as in Cowper. Brown's Rep. 437.—*è contrà*, Poſt, 471. 1 Rolls abr. 834, pl. 15. Cro. Car. 447. 449. 2 Wms. 335.——Vid. Douglas's Rep. 463. 759 to 764.

A. deviſes 50*l.* to his heir at law, and gives his wife *all the reſt and reſidue of his real and perſonal eſtate, and makes her executrix*; *theſe words paſs a fee to the wife.*

A. By will deviſes 50*l.* to the defendant, his daughter and heir, and gives all the reſt and reſidue of his real and perſonal eſtate whatſoever to his wife, and makes her ſole executrix.

It was argued, that theſe words do not paſs a fee, being joined with the words perſonal eſtate, for which were cited, *Cro. Car. Wilkinſon* verſus *Merryland*, 3 *Mod.* 164, and *Heylin* verſus *Heylin*, ibid. 228, and *Carter* verſus *Horner*, 4 *Mod.* 89, and
‡ Salk. 236. the Earl of *Bridgwater* and Duke of *Bolton* ‡.

† For the inſtances in which a fee will paſs by *deed or grant*, without the word heirs, conſult 10 Viner's Abr. tit. Eſtate, K 2. L. L. As to the paſſing of an eſtate of inheritance in laſt wills and teſtaments, without the word heirs, ſee 8 Viner's Abr. tit. Deviſe, (Z a) 242. and Gilbert's Law of Deviſes, 19.

But

But after ſome time taken to conſider of it, my Lord Keeper decreed, that this deviſe carried the fee.

Bowdler *verſus* Smith. Caſe 216.

ONE deviſes in theſe words: *As to my temporal eſtate, where-with* God *hath bleſſed me, I give and diſpoſe thereof as fol-loweth*; Firſt, *I will that all my debts be juſtly paid, which I ſhall at my death owe or ſtand indebted in to any perſon or perſons what-ſoever*; *alſo I deviſe all my eſtate in* G. *to* A. B. and this was all the real eſtate the teſtator had; and *per* Lord Keeper, this will creates a charge on the real eſtate for payment of debts.

2 Eq. abr. 371, c. 14. 504, c. 43. S. C. 3 Wms. 91. Antè 37. Poſt, 430.

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* Noys *verſus* Mordant. Caſe 217.

1 Eq. abr. 273, pl. 3. 2 Vern. 581. more fully and accurately reported. Gilb. Eq. Rep. 2. S. C.

A. Being in poſſeſſion of an eſtate that was a mortgage in fee, by will deviſes it to his daughters *B.* and *C.* and their heirs, and dies; *B.* marries and dies; the queſtion was, Whether the ſhare of *B.* ſhould be decreed real or perſonal eſtate, and conſequently go to her heir, or to her huſband as her adminiſtrator?

A. mortgagee in fee in poſſeſſion, deviſes it to his two daughters, and their heirs; one of the daughters marries, and dies: held that her ſhare ſhould not go to her huſband as perſonal eſtate, but ſhould deſcend to the heir of the wife.

My Lord Keeper decreed it againſt the huſband, and put this caſe: A man ſeiſed of lands in fee, which were only mortgaged to him, deviſes them to his ſon and heir, and his heirs; ſurely theſe lands ſhall deſcend as an inheritance; or though the mortgage be paid off, ſhall not the money be conſidered as lands, and go to the heir, and his heirs, as the lands would have done, and this purely by the intention of the teſtator? And did not the teſtator, who had a governing power, intend, in the preſent caſe, that the mortgaged lands ſhould be conſidered as any other lands of inheritance, and be ſubject to, and directed by, the ſame rules that other eſtates are?

*DE

Termino S. Mich.

1708.

In Curia Cancellariæ.

Caſe 218.

Woodman *verſus* Skute.

Gilb. Eq. Rep. 9. S. C. 2 Vern. 187. 3 Wms. 294. (n.)

A. being taken by the huſband going to bed to his wife, gives him ſecurities for payment of 500 *l.* A bill to be relieved againſt the ſecurities, alledging, that it was a plot to catch him, and that he was compelled by threats to enter into them. Bill diſmiſſed.

THE defendant coming home from *Blakenly* fair, finds the plaintiff naked, and juſt going to bed to his wife; he thereupon gets a note from him of 500 *l.* which was in *June*; afterwards, in *Auguſt* following, the plaintiff gives him a judgment, and in *October* following ſurrenders copyhold lands to him by way of farther ſecurity.

The plaintiff brought this bill to have the ſeveral ſecurities delivered up, alledging a contrivance to catch him in that manner; and that he was drunk, and did not know what he did; and that the defendant with an ax threatened to cut him in pieces, ſo that he was under terror; and that the defendant himſelf had ſaid in company, that the ſecurities were for money lent.

My Lord Chancellor obſerved, that there was no proof at all of a plot to catch the plaintiff in this manner, nor that he appeared to be ſo diſordered or frighted; for he continued in the ſame mind when he was in cool blood, at the ſeveral times of

of giving the three * different ſecurities; and it was proved, that he joined with the defendant in giving out, that that note was given for a bargain of graſs, ſo that he knew what he was about, and had a mind to conceal it. 267

If a jury in this caſe had given damages, this court could not relieve, and why ſhould it? When the plaintiff himſelf has three times given and aſcertained the damages againſt himſelf, it ſhews he thought the damages but reaſonable: ſo diſmiſſed the bill, but without coſts, becauſe the defendant has bragged of his bargain, which was a ſign he thought himſelf over-paid; but my Lord Chancellor ſaid, he would relieve againſt the penalties.

Anonymous. Caſe 219.

AN uncle gives his niece by will 1200 *l.*; the niece marries, but antecedent to the marriage the father takes a bond from the then intended huſband to pay him 200 *l.* in caſe the daughter ſhould happen to die without iſſue male, in the life-time of her huſband; the daughter did die without iſſue male, living her huſband; whereupon the father ſued the huſband at law upon this bond; and the huſband brought his bill here to be relieved againſt this bond, and had a decree accordingly; for it appearing that no money was paid, nor conſideration for entering into it, *the court took it to be in nature of a marriage brokage bond*, and therefore ordered it to be delivered up.

Poſt, 522. 2 Vern. 588. S. C. entitled *Keate* v. *Allen*. 2 Eq. abr. 187. 1. S. C. 2 Chan. Rep. 176. 1 Vern. 412. 2 Vern. 392. 446. 652. Salk. 158. 1 Wms. 118. 496. 1 Vezey, 503. 2 Vezey, 375. 2 Atk. 535. 3 Atk. 566.

Carter *verſus* Bletſoe. Caſe 220.

2 Vern. 617, S. C. 2 Eq. abr. 540, c. 5. S. C. Antè, 109. 140. 195. 213. Poſt, 290. 500. ——See alſo, 1 Strange, 238.

A. deviſes to his two younger ſons and a daughter, out of lands, portions of 600 *l.* apiece, payable at 21, with maintenance; the daughter marries, and dies under age, having two children: held that this was not ſuch an intereſt veſted in her, as ſhould go to her huſband as adminiſtrator.

Matthew Bletſoe by his will deviſes his lands to his eldeſt ſon *S. Bletſoe*, and his heirs; but his will and mind is nevertheleſs, that the ſaid *S. Bletſoe* ſhould pay out of the land ſo deviſed to him, the ſum of 600 *l.* * *viz.* to his daughter *Mary* the ſum of 200 *l.* at her age of 21 years; and to his ſon *John* 200 *l.* at his age of 21 years; and to his ſon *Matthew* the ſum of 200 *l.*

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200*l.* at his age of 21 years; and if it ſhould pleaſe God to take out of this life his ſon *S. Bletſoe*, before he attained the age of 21 years, then his will was, that his ſon *John* ſhould not have the 200*l.* ſettled on him, but that it ſhould be paid to *Mary* and *Matthew*, to be added to their portions, and he to have all the eſtate given to *S. Bletſoe*, paying the 600*l.* as before expreſſed, and that his ſaid children ſhall be allowed 4*l. per ann.* maintenance for every 100*l.* until their ſeveral portions were paid.

S. Bletſoe died before his age of 21 years; the plaintiff married *Mary*, and has two children by her; *Mary* died two months before her age of 21 years, and the queſtion was, Whether this was not a ſubſiſting charge upon the land and intereſt ſo veſted in *Mary*, as to entitle the plaintiff, as her adminiſtrator, to the legacies, though ſhe died under 21 years.

It was urged for the plaintiff, that theſe were portions, and ſo called by the expreſs words of the will; and by the civil law a portion is always conſtrued to be for preferment in marriage, which may happen long before the age of 21 years, as this caſe was; and as to the 100*l.* that fell to her on *S. Bletſoe*'s death, and no time was limited for the payment of that, therefore the plaintiff ought to have a decree *quoad* that at leaſt.

It was likewiſe urged, that 4*l. per cent.* being allotted till they came of age, made it an intereſt veſted, and the teſtator muſt intend this deviſe as a *debitum in preſenti*, though *ſolvend. in futuro*, becauſe intereſt imports a debt.

But my Lord Chancellor diſmiſſed the bill as to both demands, becauſe there was no words in this will which veſted any intereſt in thoſe legacies before the age of 21 years; and as to the other 100*l.* that was governed by the other legacies.

Hedges

* Hedges *verſus* Hedges.

2 Eq. abr. 263, c. 4. S. C. Gilb. Eq. Rep. 12, 13. S. C. 7 Vin. abr. (tit. Cuſtom of London, b. 8.) 138, 215. S. C. 2 Vernon, 615. S. C.

A freeman of *London* being deſirous to make a difference between his children in point of fortune, deviſed

SIR *William Hedges* being a freeman of the city of *London*, and having children by two venters, and being deſirous to make a difference between them in point of fortune, by his will gives two of them a ſpecific legacy of a bond of 3000 *l.* to two of them a bond of 3000 *l.* Afterwards, by advice of his lawyer (whom he conſulted about the beſt method of ſecuring of it to them) the clauſe in the will was obliterated, and the will republiſhed, and the bond was altered, and new ſecurity given in the name of *J. B.* in truſt for theſe two children; yet held, that this 3000 *l.* muſt be brought into *hotchpot*, if they would entitle themſelves to any farther ſhare of the perſonal eſtate.

Afterwards being in doubt, whether it might not be beſt ſecured to them by ſome act in his life-time, he ſent for his lawyer to conſult with him, and his lawyer adviſed him to do it by act executed in his life-time; whereupon the clauſe or ſentence in the will, which gave the 3000 *l.* was obliterated, and the bond was altered, and a new ſecurity given in the name of Sir *James Bateman*, in truſt for thoſe children, and the will republiſhed; and ſoon after Sir *William Hedges* died; and if theſe children ſhould have an equal ſhare of one third of this eſtate with the other children, and alſo retain to themſelves 3000 *l.* was the queſtion.

It was urged to be the plaineſt intent of Sir *William* imaginable that they ſhould, and it would be contrary to equity that the miſtakes of the lawyer ſhould fruſtrate ſo manifeſt an intent.

That rather than this ſhould be conſtrued an advancement of them in Sir *William*'s life, ſo as to make them bring it into *hotchpot*, equity ought to conſider it as a deviſe *cauſâ mortis*, and that it ſhould go out of the freeman's legatory part.

But *per Curiam*, this cannot be conſtrued a deviſe, or *donatio cauſâ mortis*; † for that is, where a man lies in extremity, or being ſurprized with ſickneſs, and not having an opportunity of making his will; but leſt he ſhould die before he could make it, he *gives with his* * *own hands* his goods *to his friends about him:* this, if he dies, ſhall operate as a legacy; but if he recovers, then does the property thereof revert to him; but in this caſe the teſtator Sir *William* acted deliberately, and made his election, that they ſhould take

† Poſt, 300. 1 Wms. 404. 441. 3 Wms. 357.

take by a gift in his life-time, and for that purpoſe altered the ſecurities, and republiſhed his will.

My Lord Chancellor farther ſaid, that he believed the intent of Sir *William* was as has been ſuggeſted; but if men will deliberately lay down premiſes, and from thence draw falſe concluſions, this court has no juriſdiction to ſet right ſuch miſtakes; and though Sir *William* thought, that notwithſtanding this advancement, they would come in for an equal ſhare with the reſt of the children, yet it is plain, that both he and the lawyer miſtook the law and cuſtom of *London*; and ſhall this court interpoſe when there is no fraud or equitable circumſtances in the caſe? and therefore decreed the 3000*l.* to be brought into the *hotchpot*, if they would entitle themſelves to any farther ſhare †.

Caſe 222. ‡ Attorney General, at the relation of the Maſter and Fellows of Sidney College, in Cambridge, *verſus* Bains, and Mary his wife, heir of Dr. Johnſon, & al'.

Poſt, 389. Gilb. Eq. Rep. 5. 1 Eq. abr. 47, pl. 7. S. C. 2 Vernon, 597. S. C. 1 Salk. 163. 2 Wms. 260. 3 Atk. 141.

A will wanting witneſſes, will not operate as an appointment to a charity, by the 43 *Eliz.*

DR. *Johnſon*, ſeiſed of ſeveral freehold and copyhold lands, and poſſeſſed likewiſe of divers leaſehold lands, ſurrenders the copyhold to the uſe of his will, and after makes his will in writing, whereby he deviſes all his eſtate, *viz.* freehold, copyhold, and leaſehold, to truſtees, their heirs and executors, in truſt, for the maintaining and providing for ſeveral poor ſcholars of *Sidney* college, in *Cambridge*, and for divers other charities in his will particularly expreſſed and directed; and this will was all written with his own hand, but had no witneſſes to it.

271 * Afterwards he makes a codicil, wherein he recites and takes notice of the will, and this codicil was ſubſcribed by four witneſſes, and duly executed, and ſoon after dies.

† This decree was appealed from to the Houſe of Lords, and reverſed, 1 Brown's Caſes in Parl. 254.

‡ Vid. Stat. 9 *G.* 2. cap. 36. Blackſt. Comment. vol. iii. cap. 18. pag. 273.

And

And now this bill was brought to have the truſtees take upon them the truſts, and to have a ſpecific performance thereof.

It was urged, in ſupport of the charities, that † as to the copy-holds no queſtion could be made, but that the will was ſufficient, becauſe they d n t paſs by the will, but by the ſurrender; and as to the leaſehold lands, they being but chattels, are part of the perſonal eſtate, and not within the Statute of Frauds and Perjuries. † 2 Atk. 497. 1 Vezey, 225.

As to the freehold lands, though the will be not effectual as a will to paſs them within the Statute of Frauds and Perjuries, for want of conforming to the circumſtances required by that ſtatute, yet it is good as an appointment to a charity within the 43 *Eliz.* for which was cited 11 *Co.* the caſe of *Magdalen* college, where want of livery and attornment ſhall be ſupplied, and alſo *Cotiſon's* caſe in *Hob.* 2 *Rol. Rep.* 318, and *Duke* on *Charitable Uſes*, 110†, where it is held, that tenant in tail, *without fine or recovery*, may by will, or otherwiſe, appoint to a charity, and ſuch appointment in all caſes, where the party has a diſpoſing power, ſhall be ſupported in favour of a charity, though other ceremonies to other purpoſes would be requiſite. † 1 Vezey, 225.

It was farther urged, that the codicil taking notice of the will, and being duly executed, that makes the will good too, as if it was affixed to the will at the time of the execution thereof; for the law annexes and conſtrues it as part of the will, and the laying of it in another place ſi nifies not ing.

On the other ſide it was inſiſted, that the will not being executed according to the Statute of Frauds and Perjuries, cannot be good to paſs the freehold lands, and the taking notice of the will in the codicil cannot mend it, for that, for ought appears, might be executed * in another room, and the witneſſes to that ſee or know nothing of the will. 272

That deviſes or diſpoſitions to a charity were not in all caſes ſupported; that infants, fe e coverts, and lunatics, are as much diſabled in this, as in all other caſes; that the reaſon why tenant in tail y, without fine or re overy, deviſe to a charity, is, becauſe the 43 *Eliz.* being ſubſequent in time, has repealed the Statute

de Donis, and by an artificial diſtinction between a deviſe and an appointment; but the 29 *Car.* 2. is ſubſequent to the 43 *Eliz.* and extends as well to a charity as any thing elſe.

Lord Chancellor. I ſhall be very loth to break in upon the Statute of Frauds and Perjuries in this caſe, as there are no inſtances where men are ſo eaſily impoſed upon as at the time of their dying, under the pretence of charity, for the ſtatute requires that the will ſhall be ſo and ſo circumſtanced, otherwiſe it is void to all intents and purpoſes.

It is true, the charity of judges have carried ſeveral caſes on the 43 *Eliz.* great lengths, and this occaſioned the diſtinction between operating by will and appointment, which ſurely the makers of that ſtatute never thought of.

Afterwards it was decreed, that the will not being good as a will, could not operate as an appointment.

* DE

Termino S. Hillarii,

1708.

In Curia Cancellariæ.

Terry *verſus* Terry and Ragget. Caſe 223.

Gilb. Ch. 341. Gilb. Eq. Rep. 10. S. C. Poſt, 505. 1 Vernon, 197. 295. 2 Vernon, 548.—*à contra*, 1 Wms. 141. 243. 3 Wms. 100. S. C. cited (n.) 7 Brown's Parl. Caſes, 293.—Vid. Brown's Rep. 359. *ſee further Northingh. Ward. Rep. 665. 856.*

THE plaintiff's wife *Eliz.* was the only child of *William Goodier*, who made his will, and the defendants executors and overſeers thereof, for the benefit of the plaintiff *Eliz.* then and ſtill an infant, and impowered them thereby to act and do as they ſhould think would be moſt for her advantage, and died poſſeſſed of a perſonal eſtate to the amount of 3000*l.* and upwards, which the executors poſſeſſed themſelves of, having firſt proved the will.

An executor or overſeer, who has power by the will to act in every thing for the advantage of an infant, may lay out part of the perſonal eſtate in the purchaſe of lands in the infant's name; but if *he lends the money on a bad ſecurity, he muſt anſwer it out of his own pocket.*

Some time after, the executors hearing ſome copyhold land was to be ſold, which lay contiguous and near to other lands of the plaintiff's, and which had formerly been ſold for 210*l.* purchaſed the ſame in the infant's name for 200*l.* and took a conveyance accordingly.

Another 100*l.* they lent out upon bond to one who, at the time

time of the lending, was a conſiderable trader, and eſteemed a man of ſubſtance, having an eſtate of 60*l.* *per ann.* beſides his trade, and ſeveral witneſſes ſwore they would at that time lend
274 him 500*l.* upon his * own note only; but it happened that he after failed, and the money became deſperate.

The plaintiffs not liking the copyhold purchaſe, brought this bill to have an account of all the teſtator's perſonal eſtate, and that the defendants might be decreed to pay the ſame to the plaintiffs, and not throw upon them the loſs of the money, and oblige them to take the copyhold land againſt their liking.

It was inſiſted upon to be the practice of this court, that executors had no power to inveſt money in lands, unleſs the will had given them ſuch authority; becauſe the ſucceſſion of land was to go one way, and the ſucceſſion of money or perſonal eſtate another; and here, by this purchaſe, the huſband would be defeated of ſo much of his wife's portion, over which he would have had power, had not this purchaſe been made, and therefore it ought not to ſtand.

The defendants inſiſted upon the power the will gave them to act for the plaintiff's advantage, and that this purchaſe was ſuch; and as to the 100*l.* relied on the proof they made of the perſon's abilities at the time they lent it.

As to the 100*l.* my Lord Chancellor decreed them to pay it, and make the beſt they could of the bond themſelves, either by a commiſſion of bankruptcy or otherwiſe, as they ſhould be adviſed, and ſaid, he did this for example, to diſcourage men from taking ſingle perſons bonds; and that conſidering the contingencies and hazards of trade, a man's bond for 100*l.* that is to lie any time, is not ſecurity for above 50*l.* and ſo he would take this, notwithſtanding his abilities at the time of lending it; but as to the copyhold purchaſe, it appearing by the proofs *to be for the plaintiff's benefit*, he decreed that to ſtand, and ſaid, that purchaſes made in infants names might be good enough, and here ſhe is ſtill an infant, and therefore the time of her agreement or diſagreement is not yet come; beſides, being married, ſhe has

has no will of her own, and her huſband * *has already ſhewn her conſent to this purchaſe, by cutting down timber off the land.* 275

Then it was prayed, that ſhe might have liberty by the decree to diſſent to this purchaſe when ſhe came of age, and to claim the money; but that my Lord diſallowed likewiſe, and ſaid, as the tree falls ſo let it lie, and pronounced his degree accordingly.

Kirk *verſus* Clark & al'.

Caſe 224.

27 *January.*

Gilb. Ch. 251. 2 Eq. abr. 165, c. 5. 479, c. 8. S. C.

A *Ceſtuique Truſt* muſt in all caſes be a party, but the truſtee need not, eſpecially if *Ceſtuique Truſt* undertakes for him.

THIS was a bill brought by a truſtee to compel the ſpecific performance of marriage articles, and the *Ceſtuique Truſt* was not made a party, and therefore it was prayed, that the cauſe might not go on after opening the bill and anſwer, becauſe if the bill ſhould be diſmiſſed, the *Ceſtuique Truſt* would not at all be bound by it, and ſo the defendants liable to another ſuit for the ſame cauſe.

It was ſaid, that though ſometimes bills brought by a *Ceſtuique Truſt* had been allowed, without making the truſtee a party; yet that was upon the *Ceſtuique Truſt*'s undertaking for the truſtee, that he ſhould conform to what decree ſhould be made, which might be reaſonable, he having no intereſt at all in his own right; but a truſtee could not ſo undertake for his *Ceſtuique Truſt.*

The court ordered the plaintiff to pay this day's coſts, and to make the *Ceſtuique Truſt* a party, and the former bill, anſwer, and depoſitions, to ſtand; and the next day the *Ceſtuique Truſt*, who was a feme covert, was made plaintiff by her brother, and *Prochein Amy* againſt the defendants, one of whom was her huſband, and the courſe of the court agreed to be, that a feme covert may ſue her huſband by *Prochein Amy*; they would not make her defendant, becauſe it would have taken time to have put in her anſwer.

The

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A. ſurrenders the reverſion in fee of copyhold lands to his ſon, to leſſen the fine he muſt have paid in caſe it had come to him by deſcent, after the ſon's treaty of marriage; the father tells the wife's friends, that this copyhold was ſo ſettled, in conſideration of which, and of ſome leaſehold lands, a marriage was had, and 2000 *l.* portion paid: this ſurrender of the copyhold held not to be voluntary or fraudulent.

The caſe appeared to be, that Sir *Nicholas Clark* was tenant for life of copyhold lands, with the remainder * to his wife for life, the reverſion to himſelf in fee, and makes a ſurrender of the reverſion to his eldeſt ſon in tail, the remainder to his own right heirs, which ſurrender was made to his ſon, with intent only to leſſen the fine he would have paid, in caſe the reverſion had come to him by deſcent from his father, he having it by this ſurrender as a purchaſe; afterwards, upon a treaty of marriage between the ſon and a young lady, who was to have 2000 *l.* portion, her friends, upon diſcourſe of a ſettlement, underſtanding the father had a leaſehold eſtate beſides the copyhold, propoſed to have both ſettled, but told him, they relied chiefly upon the copyhold, that being the only equivalent for the fortune; upon which Sir *Nicholas* told them, he had ſettled that already on his ſon by a ſurrender; and thereupon an agreement was made for ſettling the leaſehold eſtate upon the young lady, and the iſſue of that marriage, and reduced into writing, and recited the intended marriage and portion, and that in conſideration thereof thoſe leaſes were agreed to be ſettled in ſuch manner as therein mentioned; and after, a ſettlement was made accordingly: ſome time after, Sir *Nicholas*'s lady dying, and he being in treaty for another marriage, entered into articles for making a ſettlement upon her, and amongſt other things, covenanted to ſettle the copyhold lands on her for a jointure, *&c.* to ſuch and ſuch uſes; and now this bill was brought by her and her truſtees (the marriage being had accordingly) to compel a ſpecific performance of thoſe articles.

For the plaintiff it was inſiſted, that the ſettlement on the ſon was purely voluntary, before any treaty of marriage, and therefore fraudulent and void againſt purchaſers for valuable conſideration, without notice, as the plaintiff was; that if ſuch (as a ſettlement made in ſuch a ſecret manner as this was) ſhould prevail againſt the plaintiff, the intent of the ſtatute 27 *Eliz.* would be entirely defeated; and that this differed from

277 a voluntary ſettlement on a wife or younger children, for * whom the father was bound to provide; but here it was upon the eldeſt

eldeſt ſon, who would have had it without ſuch ſettlement by courſe of deſcent, and therefore there could be the leſs ſuſpicion or notice of the father's want of power to ſettle it on his ſecond marriage; it was likewiſe inſiſted, that the agreement on the ſon's marriage, being reduced into writing, the parties had ſet up their reſt there, and ought to be bound by it, and that it would be of dangerous conſequence, after ſuch agreement in writing, to admit of any looſe diſcourſes had before to make any part of the agreement, for when it was reduced into writing, the minds of the parties muſt be ſuppoſed to be fully ſearched, and all that they intended to be contained therein; and ſeeing that agreement mentions only the ſettling the leaſehold eſtate to be the proviſion intended, no extravagant parol declarations of the father's having already ſettled the copyhold eſtate on him ought to be admitted, nor any proof to enforce the ſame; and then that agreement in writing ſtanding ſingly on the leaſehold eſtate, the copyhold eſtate, which was long before ſettled, and at a time when there was no proſpect of the ſon's marrying, ought to be looked on as voluntary, as againſt the plaintiff, and the rather, becauſe the intent of it appears to be only a contrivance to eaſe the ſon of the great fine he muſt have paid, in caſe it had come to him in courſe of deſcent, and for no other reaſon, ſince he was not to have it till after his father's death, he keeping the eſtate for life ſtill in himſelf.

On the other ſide it was ſaid, that this ought not to be looked upon as a voluntary and fraudulent ſettlement as to the plaintiff, *becauſe it was the chief inducement that prevailed on the friends of the ſon's wife to conſent to the marriage, and to give her ſuch a fortune*; and that if they had not been aſſured the copyhold was already ſettled on the ſon, they would have inſiſted on a ſettlement thereof, or not have given her ſuch a portion; and to make void this ſettlement now would be to * give the father leave firſt 278
to marry his ſon to that eſtate, and then again, after to marry himſelf to it, and ſo to make the ſame eſtate a ſnare and trap to deceive either his own or his ſon's wife, and the ſurrender to the ſon being upon record, the plaintiffs might have had recourſe

thereto, and ſatisfied themſelves, and there was no occaſion upon the ſon's marriage, *actum agere*, to ſurrender the copyhold to him, when he had it already.

My Lord Chancellor decreed the ſurrender to the ſon good; and though it were at firſt voluntary, *yet upon his treaty of marriage*, it being regarded *as the principal inducement thereto*, it now became valuable, and ought to be conſidered, as if it had been but then ſurrendered to the ſon; and it was not neceſſary to inſert it in the articles, it being an eſtate of another nature, and to paſs in another manner, and being already ſettled, it was ſufficient in the articles to provide for the ſettlement of what they farther intended to ſecure on that marriage, without taking notice of what was already ſettled to their ſatisfaction; and ſo the copyhold paſſed by the ſurrender, as a proper conveyance for that kind of inheritance, and the leaſehold by the ſettlement, as a proper means for carrying over that, and both together made the ſettlement inſiſted and agreed upon to be made, and were in conſideration of marriage, and a marriage portion, which ſurely is a valuable conſideration, and ought not to be ſet aſide as fraudulent in a court of equity; and ſo diſmiſſed the bill with coſts.

Powell *verſus* Powell.

Caſe 225.

A decree againſt tenant in tail, who had agreed to ſell his eſtate, he ſtands out all proceſs of contempt for not obeying it, yet his iſſue not bound by it.

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IN this caſe was cited a caſe where tenant in tail contracted for ſale of his lands, and received part of the conſideration money; and upon his not making * good the ſale by fine or common recovery, a bill was brought in equity to compel him thereto, and a decree pronounced accordingly; he notwithſtanding ſtood out all proceſs againſt him to a contempt, and then died before the ſale was perfected; and after his death a bill was brought againſt his iſſue in tail to revive the decree againſt him, but was diſmiſſed; for though the tenant in tail had power by the fine or recovery to have barred his iſſue, yet ſince he did not make uſe of that power, his iſſue could not be bound by any other act of his.

*DE 280

Termino Paſchæ,

1709.

In Curia Cancellariæ.

Whitcombe *verſus* Whitcombe. Caſe 226.

Where the entry of the mother as guardian in ſoccage to her infant ſon ſhall gain a *Poſſeſſio Fratris*.

THE plaintiff's bill was to ſet out of the way ſeveral terms for years kept on foot by the defendants, the truſts whereof were ſatisfied, and to be admitted to redeem other terms for years on payment of what ſhould appear to be due thereon, that ſo the plaintiff might be let in to try his title at law, in an ejectment, as heir to one *Whitcombe*, an infant, deceaſed.

Upon opening the bill and anſwer, the caſe appeared to be this: *Peter Whitcombe*, father of the defendants, was a *Turky* merchant, and being abroad in *Turky* ſeveral years, acquired a very conſiderable perſonal eſtate; and upon his return home intermarried with one Mrs. *Sherrard*, with whom he had 5000*l.* portion, and by her had iſſue two daughters, both defendants, and both under age; ſome time after the marriage, *Peter Whitcombe* purchaſed the eſtate in queſtion, being of the yearly value of 600*l.* or thereabouts, and ſoon after his wife died; and then he intermarried with the defendant the Lady *Hoſkins*, and about

September 1704 died, leaving the Lady *Hoſkins enſeint* of a ſon, whereof ſhe was delivered about three months after her huſ-
281 band's death. Immediately upon * her huſband's death, the Lady *Hoſkins* entered upon his whole eſtate, and received the profits thereof, and held courts in the name of the two daughters, as heirs at law, and cut down about 1000*l.* worth of timber for maintenance of herſelf and her children; afterwards the ſon was born, and lived about nine months, and then died; thereupon the plaintiff, as heir at law of the whole blood to the infant, who was laſt ſeiſed of the freehold and inheritance of the premiſſes, brought his ejectment to recover the poſſeſſion thereof, and made out his title thus; *viz.* ſon and heir of *John Whitcombe*, who was ſon and heir of *Peter Whitcombe*, who was grandfather of *Peter Whitcombe* the merchant, father of the infant ſon. Upon the trial, the defendant ſet up ſeveral terms for years, whereupon the plaintiff was nonſuit.

He now brought this bill to be relieved againſt thoſe terms, and have thoſe whereon nothing was due to be ſet aſide, and be admitted to redeem others whereon any thing ſhould appear to be due, that ſo he might try his title at law to the lands in queſtion.

The defendants, the infants, by their guardian anſwered, and admitted, that their father was ſeiſed of ſuch eſtate, and had ſuch iſſue, and hoped the court would take care of their intereſt.

The Lady *Hoſkins* admitted likewiſe ſuch ſeiſin of her huſband, and ſaid, that after his death ſhe entered and held courts in the name of the infants the daughters, and cut down ſuch timber, and ſhe and the other defendants inſiſted, they ought not to be compelled to give the plaintiff any aſſiſtance to make out his title.

For the plaintiff it was inſiſted, that when the father died, and his wife entered generally, ſuch entry ought not to be conſtrued a tort, when it will admit of another conſtruction, as it will in this caſe, and that is, as having a right and good title as guardian in ſoccage to her infant ſon; and then her

ſeiſin

ſeiſin was a ſeiſin for him, * and would entitle the plaintiff 282
as fully as if the infant himſelf had been in actual poſſeſſion; and though ſhe might indeed, after ſuch general entry, ſo far declare her intention, as to make her a diſſeiſſeſs *ab initio*, as if ſhe had afterwards levied a fine, yet without ſome ſuch act ſhe ſhould not be taken to be a wrong doer, when by a reaſonable conſtruction her entry might be intended lawful, and no parol declaration in *Pais* would ſerve to make her entry wrongful; and if this were ſo, then nothing ſtood in the plaintiff's way to hinder his being relieved in this court; for as to the terms for years they could be no impediment, becauſe the poſſeſſion of a leſſee for years, is the poſſeſſion of him that has the freehold; and then the plaintiff, as heir at law to the infant ſon, who by his guardian was laſt actually ſeiſed of the freehold, had good title at law; and this is ſo clear and known a caſe, that they need not cite many authorities to prove it, for *Co. Lit.* 15. where he treats of the doctrine of *Poſſeſſio Fratris*, makes it clear beyond diſpute. They attempted likewiſe to prove, but could not make it out, that rents were reſerved upon thoſe leaſes for years, and paid to the defendant the Lady *Hoſkins*, as guardian, which would have made ſtill ſtronr for them, beſides ſome proof that the defendants the daughters had 6000*l.* provided for them by their father in his life-time, and that he declared his eſtate ſhould go and continue in his name and family; and thereupon it was inferred, that they being already provided for, the plaintiff's application was the more reaſonable, and they ought to help him to a diſcovery for making good his title at law.

On the other ſide, for the defendants it was inſiſted, that they were unprovided for by their father, and therefore were in the nature of creditors, and ought not to be compelled in a court of equity to give the plaintiff any aſſiſtance for making out his title to ſtrip them of their inheritance; that in the caſe of children it was not unuſual in this court to relieve, even againſt * an heir at law; and therefore if a copyholder deviſed his 283
land to his younger children, or that it ſhould be ſold to raiſe

portions for his younger children, and made no ſurrender to the uſe of his will, yet this court would ſupply it againſt the heir at law.

Alſo it was obſerved, that the infant ſon was not born till three months after the father's death, and that the mother entered immediately upon her huſband's death, and that could not be as guardian in ſoccage to the ſon, for he was not then born; and if her entry at firſt was not as guardian to her ſon, which it could not poſſibly be, ſhe did nothing afterwards to alter the nature of her poſſeſſion, were it by right or wrong; and as to the daughters, ſhe could not enter as guardian in ſoccage to them, for it never was heard of that a ſtep-mother could be guardian in ſoccage; beſides, her entry as to one third part was in right of her dower at common law, and then, as to that, it was a continuance of the ſeiſin of her huſband, and took away the deſcent of that third part to the ſon, and ſuch entry for dower was good till avoided by the heir at law, or his guardian.

It was likewiſe much inſiſted upon, that the defendants were children unprovided for, and therefore in the nature of creditors, and equity ought not to give him any help, or make his caſe better than it was at common law.

My Lord Chancellor ſaid, he thought it a caſe of great compaſſion, and that he would give the plaintiff no aſſiſtance, unleſs the daughters were otherwiſe provided for; but becauſe the plaintiff alledged, that by a deed in the Lady *Hoſkins*'s cuſtody, it appeared, that 6000*l.* was ſettled on the daughters, he ſaid, that if that was fully proved it might alter the caſe, and ordered the deed to be produced (though that was likewiſe greatly oppoſed) and the Lady *Hoſkins* having ſuch a deed wherein ſuch proviſion was made, afterwards the matter was compromiſed.

Anonymous.

* Anonymous.

2 Wms. 549. 3 Wms. 387. 2 Vezey, 559.

A Petition upon the † late act of parliament was read, for enabling infants of the age of 12 years, or upwards, on whom any truſt-eſtate or mortgage is devolved, to convey to the *Ceſtuique Truſt*, or mortgagor, on Payment of the money to the executors; the petition ſet out the conveyance in truſt to three perſons, and that ſuch a one being the ſurvivor, was dead, and the eſtate in law devolved upon an infant, who was in court; alſo the declaration of truſt was read, and the conſent to the next heir at law to the infant required, and then an order was made for the infant, by her guardian, to convey over the truſt-eſtate to the *Ceſtuique Truſt*, and the conveyance to be ſettled by the Maſter.

† 7 Ann. cap. 19.

The manner in which infants truſtees are to convey the eſtates devolved on them, purſuant to the act of parliament

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Termino S. Hillarii,

1709.

In Curia Cancellariæ.

Caſe 228.

Bucknal & al' *verſus* Roiſton.

1 Vezey, 360.

Where a perſon who has a bill of ſale of goods for ſecuring a ſum of money lent, ſhall be preferred to a judgment creditor.

1 Atk. 165. 1 Burrow's Rep. 467.

ONE *Brewer*, ſupercargo of a ſhip which was to go a voyage to the *Eaſt Indies*, having ſhipped on board ſeveral goods and commodities, borrowed of the plaintiff 600 *l.* and gave a bottomree bond to pay 40 *l. per cent.* in caſe the ſhip ſhould reign (as they called it) three years; and at the ſame time made a bill of ſale to the plaintiff of the goods and commodities he had on board (which was invoiced particularly) and of the produce and advantage that ſhould be made thereof; and this was in the nature of a ſecurity, or pledge, for the repayment of the 600 *l.* and the 40 *l. per cent.* premium, upon the ſhip's reigning three years as aforeſaid.

The ſhip goes her voyage, and theſe goods were ſold, and with the money others bought, and thoſe likewiſe were inveſted in other goods, and ſo there had been ſeveral barters and exchange of ſeveral ſorts of goods.

The ſhip after three years returns home, richly laden with
286 ſeveral ſorts of goods; but it happened that * *Brewer* died upon the

the ſea, in his return home, and the defendant *Royſton*, who was a creditor of his by judgment for 1500*l.* obtained before the ſale of thoſe goods, takes out adminiſtration, and takes poſſeſſion of the ſeveral goods and commodities returned home, which belonged to *Brewer*.

And now the plaintiffs brought their bill to have an account and diſcovery of thoſe goods, and to have ſatisfaction for the produce and advantage that was made thereof.

The defendant by his anſwer inſiſted, that he was a judgment creditor of a higher nature than the plaintiffs, who were at moſt entitled but to an account, and in the nature of creditors by ſimple contract, and therefore could not come in till his judgment was ſatisfied.

For the defendant it was urged, that *Brewer*'s keeping poſſeſſion of the goods after the ſale, made it fraudulent and void as to creditors, who by this means were induced to think him a man of ſubſtance, and to give him credit as ſuch; that the difference has always been taken between ſuch a ſale or pledge of goods, and a mortgage of lands; for though the mortgagor does keep the poſſeſſion of lands, that is not fraudulent as to purchaſers, who may by inſpecting the deeds diſcover the title; but as to goods, if there be no change of the poſſeſſion, there is no alteration made of the property, but ſuch ſale is fraudulent and void.

And a caſe of one under St. *Dunſtan*'s church was cited by Sir *Edward Northey*, where a man took out execution againſt him by agreement between them, the owner of the goods was to keep the poſſeſſion of them upon certain terms; and afterwards another gets judgment againſt the ſame man, and takes theſe goods in execution, and it was held they were well liable, and the firſt execution fraudulent and void againſt any ſubſequent creditor, by reaſon there was no change of the * poſſeſſion, and ſo no alteration made of the property; and he ſaid, it had been ruled 40 times in his experience at *Guildhall*, that if a man ſells goods, and ſtill continues in poſſeſſion as viſible owner

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of

of them, that ſuch ſale is fraudulent and void as to creditors, and that the law has been always ſo held.

It was alſo ſaid, that admitting theſe goods themſelves ſhould be liable by reaſon of the ſale, yet the property of them being ſo often changed, the plaintiffs could not follow them now, nor could *Brewer* make over to the plaintiffs any intereſt in theſe goods, which are now come home, he having then nothing in them himſelf, and he could not bind by his ſale a future right or poſſibility.

For the plaintiffs it was urged, that theſe goods were pledged for the ſecurity of their money; that till execution actually lodged in the ſheriff's hands, a man is owner of his goods, and may diſpoſe of them as he thinks fit, and they are not bound by the judgment, which makes no lien at all upon goods; and that *Brewer* was but in nature of a truſtee for the plaintiffs of theſe goods, and they might follow them, and ought to have an ac-account of the produce they made.

My Lord Chancellor was of opinion, that the truſt of thoſe goods appeared upon the very face of the bill of ſale; that though they were ſold to the plaintiffs, yet they truſted *Brewer* to negotiate and ſell them for their advantage, and *Brewer*'s keeping poſſeſſion of them was not to give a falſe credit to him, as in other caſes which have been cited, but for a particular purpoſe agreed upon at the time of ſale; that it is true, in caſe of a bankrupt, ſuch keeping poſſeſſion after a ſale will make the ſale void againſt his creditors by the ſtatutes, and ſo for other ſales by the Statute of Fraudulent Conveyances; but here the plaintiffs are preſently entitled to the truſt of theſe goods upon the ſale, and to all the advantages conſequential upon ſuch truſt, and may follow the goods for that purpoſe; and
288 therefore decreed an * account to be taken of the produce of thoſe ſpecific goods, and if that could be made to appear, it was to be liable to make ſatisfaction to the plaintiffs; for which purpoſe it was ſaid, at the bar, that the goods belonging to *Brewer* were marked with *J. B. &c.* and other marks to diſtinguiſh them,

them, *&c.* but if not, what fell into the bulk of *Brewer*'s perſonal eſtate in general would be liable to go in a courſe of adminiſtration, and the defendant to be preferred in payment of his judgment before the plaintiffs.

Jones *verſus* Selby. Caſe 229.

2 Eq. abr. 371, c. 15. S. C.

Real eſtate made liable to a legacy, the perſonal eſtate proving deficient, and it being the teſtator's intention that it ſhould be raiſed at all events.

THIS bill was *(inter alia)* to have a legacy of 1000*l.* deviſed to the plaintiff by the will of *Charles Amhurſt*, deceaſed; and as to that, the caſe ſtood thus:

Charles Amhurſt being ſeiſed of an eſtate in fee to the value of about 800*l. per ann.* and having two ſiſters, who by their father's will had 1000*l.* apiece given them, which he, though executor to his father, had not paid, he makes his will, and thereby deviſes his eſtate to his two ſiſters for their lives, diſcharged of the payment of the 2000*l.* to themſelves, but wills, that after their deaths the ſaid 2000*l.* ſhould ſtand a charge upon his eſtate, to be paid by thoſe in remainder; then he deviſes 1000*l.* to the plaintiff, who was his niece, and then deviſes his eſtate, after the death of his two ſiſters, to the defendant *Amhurſt* in tail, with ſeveral remainders over, remainder to his own right heirs; provided always, that my executrices and executor, and tenants in tail, ſhall pay the ſaid ſum of 1000*l.* within ſix months after my death; and makes the two ſiſters and *Amhurſt*, who had the firſt remainder in tail, executors of his will, and dies, not leaving perſonal aſſets to pay this 1000*l.* and therefore this bill was brought to charge the real eſtate with the payment thereof.

* For the defendants, the ſiſters (one whereof was married to the defendant Sir *Henry Selby*) it was inſiſted, that this 1000*l.* ought to be paid out of the perſonal eſtate, for it was expreſsly deviſed to be paid by his executrices and executor, who *eo nomine*, were entitled only to the perſonal eſtate, and were his repreſentatives only for that; but admitting that it were to be a charge on the real eſtate, in caſe the perſonal eſtate proved deficient, yet it was not to be paid or charged on the eſtates 289

for life, but only by the tenant in tail when he came into the remainder, for being deviſed to be paid by his executrices and executor, thoſe words only charged them in reſpect of the perſonal eſtate; and when he ſays farther, and tenants in tail, thoſe words were to create a charge upon the remainder, in caſe the perſonal eſtate proved deficient, but not to affect the eſtate for life deviſed to the ſiſters.

But on the other ſide it was argued, and my Lord Chancellor was clearly of that opinion, that this 1000*l.* being to be paid within ſix months after his death; if by any conſtruction this could be performed, it ought to be ſo decreed, for otherwiſe the plaintiff may die during the life eſtate, and ſo wholly loſe the benefit of this deviſe; then here the words are as clear as can be to charge all the eſtates deviſed with the payment of this 1000*l.* for he expreſsly provides, that the 2000*l.* ſhall be paid by the remainder-man in tail; but when he comes to the deviſe of this 1000*l.* to the plaintiff, he varies his expreſſion, and provides that it ſhall be paid within ſix months after his death: By whom? By his executrices that had the eſtate for life: And by whom elſe? By his executor, who was the very perſon that had the firſt remainder in tail; and then adds, and tenants in tail; which ſhews plainly, that he intended not to exempt the eſtate for life, but to charge that and all the remainders in proportion with this 1000*l.* and a decree was made accordingly, † and that the intereſt, from the time the 1000*l.* became due, ſhould be paid by the * tenant for life, and their eſtate to be rated a third part of the 1000*l.* and he in remainder to be liable to the other two thirds, for which purpoſe they were all three to join in ſuffering a common recovery to dock the eſtates tail and remainders, and then to make a ſecurity of the eſtate for raiſing this 1000*l.* according to the aforeſaid rate.

Tenant for life, remainder in tail, whoſe eſtate was charged with a ſum of money, decreed to join in levying a fine, and ſuffering a recovery, and the tenant for life to pay one third part.

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† Antè, 21. 44.

Tournay

Tournay *verſus* Tournay. Caſe 230.

Antè, 109 195. 267. Poſt, 580. 2 Eq. Caſes abr. 654, pl. 6. S. C.

UPON the plaintiff's intermarriage with her huſband in 1700, he and the plaintiff, and defendant his eldeſt ſon and heir apparent, join in a ſettlement of ſeveral lands to truſtees and their heirs, to the uſe of the huſband for life, remainder as to part to the uſe of the wife for life, remainder after their two deaths, and as their ſeveral eſtates ſhould determine, to the truſtees for 500 years, upon the truſts after mentioned, with ſeveral remainders over; and it is hereby declared and agreed, that the term of 500 years is ſo limited upon truſt, and to the intent and purpoſe that the ſaid truſtees, &c. do and ſhall, out of the rents and profits of the ſaid term, or by mortgage or ſale thereof, raiſe the ſum of 400*l.* apiece for any younger child or children to be begotten between the huſband and wife, and to be paid to them reſpectively within one year after the commencement of the ſaid term of 500 years, with intereſt at 5 *per cent. per ann.* from the father's death, till paid.

By marriage ſettlement, a term is created for raiſing 400*l.* apiece for younger children, to be paid them within a year after the father's death, and with intereſt from his death; one of the children dies after the father, but within a year after his death, the portion not being raiſed, held *per Cur.* that it ſhould ſink in the inheritance, and not be raiſed for the benefit of its repreſentative.

They have three daughters and one ſon; the father dies, and one of the daughters dies afterwards, within the year after her father's death.

The plaintiff, her mother, takes out adminiſtration, and brings this bill againſt the truſtees and heir at law, to have the 400*l.* raiſed and paid with intereſt.

* For the plaintiff it was inſiſted, that this 400*l.* became due immediately upon the father's death, and might have then been raiſed and paid; and that the limiting it to be paid within a year after the commencement of the term, was only for the conveniency of the truſtees, in giving them a reaſonable time to raiſe it in; and that if they had paid theſe portions preſently, the payment would have been good, and a proper diſcharge might have been given for it

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That this caſe differed from the caſes, where a portion is to be paid at 21, or marriage, or any other time certain; there, perhaps, if the party dies before, and ſo has no occaſion for it, this court will not charge the heir's inheritance for the ſake of ſtrangers; but here it was due preſently upon the father's death, for then the term, as to part of the lands, had its commencement; and it is appointed alſo, that they ſhould have intereſt at 5*l. per cent.* till their portions paid, and ſurely there cannot be intereſt where there is no principal.

† As to this point, vid. Gilb. Chan. 268.

† On the other ſide it was argued for the defendants, that if this were a legacy, and to be paid out of the perſonal eſtate, this would be *debitum in preſenti*; and though the party died before payment, it ſhould go to their repreſentatives; but the difference has always been taken ſince *the caſe of* ‡ *Pawlett and Pawlett*, where ſuch portions are to be paid out of the perſonal eſtate, and where they are to be raiſed out of the real eſtate, and ſo execute a charge upon the inheritance of the heir; for in ſuch caſe, if the party for whom it is provided dies before payment, it ſhall ſink in the inheritance for the benefit of the heir, and his eſtate ſhall not be loaded only for the benefit of ſtrangers.

‡ 1 Vernon 204.

My Lord Chancellor ſaid, true it is in this caſe, the 400*l.* apiece was raiſable by the truſtees preſently after the father's death, if they had thought fit; but the children could not have demanded it till after the year; it was not abſolutely due upon
292 the commencement of the term, * becauſe there was a whole year given for the raiſing of it; and therefore ſince one of the daughters is dead within the year, and before ſuch time as ſhe could have demanded it, in favour to the heir, and for the benefit of his inheritance, the caſes have all gone this way, that ſuch portions ſhould ſink, and not be raiſed at all, and accordingly pronounced his decree; but as to the other children, who were likewiſe plaintiffs, an account was decreed to be taken of the rents and profits of the term, and their portions to be forthwith raiſed and paid by ſale or mortgage.

* DE

Termino Paſchæ,

1710.

In Curia Cancellariæ.

Holt *verſus* Burleigh. Caſe 231.

2 Vern. 651. S. C.

A Man makes a ſettlement upon the marriage of his ſon with one *B.* and *(inter alia)* there is this proviſo, *viz.* Provided that if the ſaid *B.* ſhall happen to ſurvive her huſband, not having iſſue, or without iſſue of their two bodies lawfully begotten between them, *B.* to have power to ſell and diſpoſe of ſuch lands. The huſband dies, leaving iſſue; ſome years after, that iſſue dies without iſſue, and then the wife ſells thoſe lands.

By marriage ſettlement there is a proviſo, that if the wife ſhall happen to ſurvive her huſband, not having iſſue, or without iſſue lawfully begotten between them, the wife to have power to diſpoſe of ſuch lands. The huſband dies leaving iſſue; ſome years after, that iſſue dies without iſſue, and then the wife ſells thoſe lands, and held ſhe had ſufficient power.

Now this bill was brought by the heir at law of the huſband, to have the deeds and writings from the vendee, as not coming in purſuant to the power.

For him it was inſiſted, that the huſband leaving iſſue, the wife did not ſurvive her huſband, not having iſſue, or without iſſue; and therefore the power never took effect.

My Lord Chancellor ſaid, there was no occaſion in this caſe to make any artificial conſtruction of the proviſo; for that the words

294 words thereof fell in naturally with the meaning of the parties, and gave her a power * to ſell when the iſſue failed; for where an eſtate is made to a man and the heirs of his body, and if he die without iſſue, or without heirs of his body, the remainder over, this is a good limitation whenever the iſſue fails; though in that caſe, if he leaves iſſue, he cannot properly be ſaid to die without iſſue. But this is a much ſtronger caſe, for death is a ſingle act, and to be performed but once; and though the iſſue dies without iſſue a year after, you cannot ſay he died without iſſue, becauſe he actually left iſſue; and yet a limitation over in ſuch caſe is good; but here ſurviving is a continuing act, and ſhe ſurvives her huſband as much a year after his death, as ſhe did the firſt moment; and therefore if the iſſue fails during her life, ſhe actually ſurvives without iſſue, or not having iſſue, becauſe the iſſue fails during her ſurvivorſhip, which continues after the failure of iſſue; and this is the plain and natural meaning of the words, and agrees with the intention of the parties, which was to give her the diſpoſal of ſo much lands, in caſe the iſſue to be provided for by the ſettlement failed, and therefore diſmiſſed the plaintiff's bill. *Note*; The caſes cited were 1 *Leon*, 285. 3 *Leon*. 106. 1 *Sid*. and 1 *Lev*. † *Goodyer* verſus *Clerk*.

† *Goodwin* v *Clerk*, Fearne, 360. S. C. cited.

D E

Termino S. Trinitatis,

1710.

In Curia Cancellariæ.

Thompſon *verſus* Waller.

Caſe 232.

2 Eq. abr. 81, c. 2. S. C. 1 Vernon, 443.—Vide, Poſt, 496. Gilb. Eq. Rep. 151. 2 Vrenon, 464. 1 Wms. 300. 2 Atk. 408.

IN this caſe it was held clearly by my Lord Chancellor, that upon an appeal, either from the Rolls to him, or from him to the Houſe of Lords, no new matter not in iſſue in the cauſe below ſhould be ſuffered or inſiſted on; and ſaid, that rather than give way to a precedent of ſuch general inconvenience as this would be, he would diſmiſs the appeal, though by it the plaintiff were forced to bring a new bill, or a bill of review for his relief.

Upon an appeal from the Rolls, or to the Houſe of Lords, no new matter to be inſiſted upon.

Willſon *verſus* Pack & al'.

Caſe 233.

Gilb. Ch. 345. 2 Eq. abr. 155, pl. 2. S. C. 1 Eq. abr. pl. 18. S. P. 2 Wms. 79. 2 Vezey, 7. 1 Atk. 440. 2 Atk. 104. 3 Atk. 370, 438. 3 Brown's Parl. Caſes, 187.—*è contrà*, † 1 Wms. 729. Chan. Rep. 377.

THE plaintiff was a woollen draper, and had ſold to the defendant's inteſtate, cloth and other goods to above 80*l.* value, for which, after the inteſtate's death, having brought his

Where the wife's paraphernalia will be liable to the huſband's debts.

† Theſe are authorities reſpecting ſpecialty creditors.—See alſo, 3 Atk. 363.

action againſt one *Buſby*, who by the conſent of the widow *Pack* had taken out adminiſtration, and upon *plene adminiſtravit*, pleaded and found for the defendant, the plaintiff had judg-
296 ment *de bonis inteſtati cum acciderint*, and the widow * *Pack* being poſſeſſed of ſeveral diamonds, jewels, and other things, to the value of 200*l.* and upwards, which ſhe pretended to have bought out of money allowed her for her ſeparate maintenance, as pin-money, purſuant to an agreement made before marriage with her father.

The plaintiff brought his bill againſt the widow, *Buſby* the adminiſtrator, and the father the truſtee, to diſcover aſſets, and to ſubject theſe jewels to a courſe of adminiſtration, in order to pay the plaintiff's debt.

For the plaintiff it was inſiſted, that admitting it had been proved theſe jewels had been bought with the money ſaved by the defendant out of her ſeparate maintenance, or pin-money, yet they ought to be ſubject to the plaintiff's debts; that it was in nature of a ſtipulated paraphernalia, and being only the ornamental part of the wife, it was more reaſonable to ſubject it to pay the huſband's debts, than that his creditors ſhould ſtarve; that true it was, if ſuch ſettlement or ſeparate maintenance were made before marriage, or after, in purſuance of articles executed before, that the huſband's creditors could not break into the fund, or ſubject that to his debts, yet theſe jewels being bought with the money ariſing thereby, † the property was immediately changed, and they became the huſband's; and to conſtrue it otherwiſe would be to ſet up a ſeparate rule of property in the wife againſt law and reaſon.

† Vid. Cro. Car. 343. 1 Roll. abr. 911. 2 Vernon, 246.

For the defendant it was inſiſted, that there was no manner of foundation for ſuch conſtruction; ‡ that the court had already gone farther in protecting even the intereſt of money ſaved out of ſuch ſeparate maintenance againſt the huſband's debts.

‡ Vid. 3 Wms. 334. 2 Eq. abr. 156. c. 4.

Then the plaintiff went into his proofs to ſhew that this ſeparate maintenance was made after marriage, and ſo fraudulent and void againſt the huſband's creditors, and that theſe jewels

were not bought with the money ſaved out of the ſeparate maintenance.

* For the defendant it was inſiſted, that though the ſettlement was after marriage, yet it was in purſuance of a bond given by the huſband before marriage; that, upon executing ſuch ſettlement, the bond was delivered up and cancelled; and that the ſettlement was recited to be in purſuance of an agreement made before marriage; but as to the bond there was no poſitive proof, it only went to their belief that there was ſuch a one; but neither the father, to whom it was ſuppoſed to be made, nor any other, could prove it directly. 297

Then as to the jewels being bought out of the ſeparate maintenance, that being but 80*l.* *per ann.* and the jewels above 200*l.* value, and bought in two years after the ſettlement, made it plain they could not be bought with money ſaved out of the ſeparate maintenance; and as to the recital in the ſettlement, that it was in purſuance of an agreement before marriage, it was inſiſted, that if ſuch bond had been given, it was eaſy to have mentioned the date and other particulars of it; that if ſuch general recitals in ſettlements made after marriage ſhould prevail, it would open a way to defraud all creditors, and therefore ought not to be allowed to bind the plaintiff, who was a ſtranger and a juſt creditor. Gilbert's Chan. 345.

Lord Chancellor ſaid, that the paraphernalia being only ſuperfluities and ornaments to the wife, was the reaſon the law ſubjected them to the huſband's debts, rather than that his creditors ſhould ſtarve; but as to ſuch ſeparate allowance, if the defendant had proved it to have been made before marriage, and that the jewels were bought with the money ariſing thereout, they would not have been liable to the huſband's debts; but here the defendant had failed in both points: that to allow ſuch general recitals in ſettlements made after marriage, would be of dangerous conſequence; and that it was ſtrange, if there was ſuch bond, that neither the father, to whom it was ſuppoſed to be made, nor the witneſs who was ſuppoſed to draw * it, ſhould be able to ſwear to it; that the perſon who ſold the jewels knew 298

nothing of any ſeparate maintenance, and had declared that he truſted only the huſband, and ſhould have taken him for his paymaſter; and therefore decreed an account to be taken of the value of the jewels, and they to be ſold to ſatisfy the plaintiff, unleſs the lady, whom he believed would be unwilling to part with them, ſhould pay the plaintiff his debt, and the coſts of this ſuit.

Caſe 234. Bird *verſus* Hooper.

Gilb. Chan. 342. 2 Eq. abr. 770, c. 6. S. C. Antè, 263.

A. by his will gives his children ſeveral legacies, and gives his eldeſt ſon 2000*l.* Afterwards gives him 400*l.* to go to *Italy*, and being a merchant, enters his ſon debtor 400*l.* Afterwards, upon a calculation of his eſtate, and finding it not ſufficient to pay the whole, he by a codicil retrenches 400*l.* out of the younger childrens' legacies, without taking notice of this 400*l.* The 400*l.* ſhall not be deducted out of the 2000*l.* to the eldeſt ſon.

A Man having ſeveral children, makes his will, and thereby deviſes to them ſeveral legacies, and amongſt the reſt gives his eldeſt ſon 2000*l.* Afterwards the father ſends his eldeſt ſon to *Italy*, and gives him 400*l.* and being a merchant, makes an entry in his book on the debtor's ſide, *My ſon* B. *debtor* 400*l.*; then by a codicil, having an account of his eſtate, and finding it would not anſwer all the legacies, he retrenches 400*l.* out of each of the younger childrens' legacies, without taking any notice of the eldeſt ſon; and by his ſaid codicil he mentions ſeveral debts that were owing to him, and gives them towards paying the legacies, but takes no notice of the 400*l.* ſo advanced to his eldeſt ſon; and ſoon after dies.

The queſtion was, Whether this 400*l.* ſhould be deducted out of the eldeſt ſon's legacy of 2000*l.* he having brought his bill for the whole legacy?

For the plaintiff it was argued, that no deduction ought to be made; for, 1*ſt*, it was plain that if ſuch entry had been before the making of the will, and then he had by his will given 2000*l.* to the plaintiff, he ſhould have had it all, without any regard to ſuch entry; that though here it was made after the will, yet * the teſtator being a merchant, and keeping books regularly for the entry of all monies iſſued out or received by way of creditor and debtor, this entry was only for a memorandum, to ſhew when and to whom this 400*l.* was paid; that it is uſual amongſt ſuch perſons to ſet down all the money they pay, and if to the cook or houſekeeper for the neceſſaries of the family, yet they uſually

uſually enter them debtor ſo much, and therefore this entry is not to be regarded.

2*dly*, When he afterwards made his codicil, he thereby retrenched 400*l.* out of all his other children's legacies, and yet takes no notice of this 400*l.* advanced to his eldeſt ſon, which, if he had intended ſhould be deducted, he would have mentioned it; beſides, he therein reckons up ſeveral ſums of money that were due to him from ſeveral perſons, and thereby makes an eſtimate of his eſtate; and if he had intended to include this 400*l.* he would likewiſe have taken notice of that, as a debt due to him.

It was alſo further urged, that this 400*l.* was advanced all at once, as a ſum in groſs for the ſetting out his eldeſt ſon in the world; that he had been no other charge to his father, whereas the other children were a conſtant charge to him; that he had a particular kindneſs for this ſon, and if the 400*l.* ſhould be deducted out of this legacy, he would have leſs ſhare of his father's kindneſs than the other children.

The defendants, the executors, confeſſed aſſets, and ſubmitted to do as the court ſhould direct.

The Maſter of the Rolls being only in court, decreed the whole 2000*l.* to the plaintiff, and mentioned a caſe of my Lord *Guernſey*, who married a daughter of Sir *John Banks*, with whom he had a conſiderable fortune in land. Afterwards Sir *John* builds a houſe upon the land, and being a merchant, makes an entry, Lord *Guernſey* debtor ſo much for building the houſe, and then makes his will, and deviſes the reſidue of his eſtate * to his two daughters; and yet it was held this houſe ſhould fall into the lump of the fortune given the Lady *Guernſey*. *Note*; For the plaintiff was cited 1 *Chan. Caſes*, 301. 300

Caſe 235.

Jones *verſus* Selby.

2 Eq. abr. 573, c. 2. Gilb. Chan. 342. S. C. Antè, 269. 1 Wms. 404. 441. 3 Wms. 356.
† 2 Vezey, 441. S. C. cited, and ſtated by Lord *H.* 3 Atk. 214.

The nature of a *Donatio Cauſâ Mortis*, in what it differs from a will, the evidence to prove it muſt be very ſtrong.

THIS was an appeal from a decree of the Maſter of the Rolls, upon one ſingle point, which was this:

The plaintiff was a relation of, and houſekeeper to, *Charles Amhurſt*, deceaſed, and had lived with him upwards of twenty years; *Charles Amhurſt*, in *March*, 1702, makes his will, and thereby gives the plaintiff (whoſe name was then *Wetherley*) 500*l.*; about two or three months after, being minded to augment her fortune, and having an hair trunk, wherein were ſeveral things of value, he ſends for her, and calls up two of his ſervants, and, in their preſence, ſays thus, *I give to my couſin Mrs.* Wetherley *this hair trunk, and all that is contained in it*, and delivers her the key thereof, and bid the ſervants take notice, and remember it, if they ſhould be at any time called upon for that purpoſe; and ſeveral times after, as it was proved in the cauſe, aſked them if they remembered the hair trunk, and once took a candle and ſhewed it them, that they might remember it.

About three years after, *Charles Amhurſt* makes another will, wherein he firſt revokes all other wills by him at any time made, and by that will gives the plaintiff 1000*l.* but takes no notice of the gift of the hair trunk, or any thing in it, and dies.

Four days after his death, upon opening of the trunk, in the preſence of ſeveral relations and others, there was found in it ſeveral rings, pieces of gold, and, among other things, a tally upon the government for 500*l.*

301 * The now plaintiff, Mrs. *Jones*, brought her bill for the 1000*l.* and for this 500*l.* tally, and had a decree for the 1000*l.* but by reaſon of the parliament ſitting, the other point, as to the tally, was heard before the Maſter of the Rolls, and he likewiſe

† In the caſe of *Ward* v. *Turner* (2 Vezey, 431.) the doctrine reſpecting a *Donatio Cauſâ Mortis* is fully explained, and many authorities cited and amply commented upon by Lord *Hardwick*: It is there determined, that the gift of receipts for S. S. Annuities is not a delivery to paſs the annuities as a *Donatio Cauſâ Mortis*.

decreed

decreed that to her; whereupon this appeal was brought. It was proved for the appellant, that the trunk was never removed from the place where it ſtood at firſt; that Mr. *Amhurſt* gave out the order from time to time for renewing of the intereſt upon the tally, and received it himſelf.

It was now inſiſted upon for the appellant, that the teſtator having given her 500*l.* by his firſt will, though he afterwards declared his intention to make it up 1000*l.* and accordingly gave her the trunk, and all that was in it, yet there was but a *Donatio Cauſâ Mortis*; that it was in the nature of a legacy, waiting for the death of the teſtator, and was ambulatory and open till that time.

That by his revoking all former wills, this donation, which was but in nature of a will, and not to receive its completion till his death, was revoked likewiſe; that however, if it were not, yet his intention appearing by the firſt will, and the ſubſequent donation, to give her but 1000*l.* that the 1000*l.* given by the will ſhould be taken in recompence and ſatisfaction thereof; that if a man gives bond for the payment of a ſum of money to another, and after, by his will, gives the ſame perſon a legacy of as great or more value, that ſhall be taken to be in ſatisfaction of the debt; *à fortiori*, in this caſe, where it was only a gift that was voluntary, and not to take effect till his death.

Beſides, it was urged, that the plaintiff ought to have proved that this tally was in the trunk at the time of the gift.

That it was probable, that if the teſtator had intended to give her that, over and above the 1000*l.* he * would have ratified it by his will, or at leaſt have taken ſome notice of it; and that being in the nature of a legacy, it ought not to ſtand againſt creditors. 302

The creditors likewiſe had brought a croſs bill, for ſatisfaction of their debts; and therefore it was prayed that the decree may be reverſed.

On the other ſide it was argued much, from the proof of the teſtator's kindneſs to the plaintiff, that the reaſon he gave no

more than 1000*l.* by his will, was, becauſe he had given his own ſiſters no more; that he intended to leave the plaintiff in ſuch a condition as to be able to keep a ſervant after his death, *&c.*; that they had proved the gift of this hair trunk by two ſervants, and his delivery of the key; that he afterwards refuſed to take the key, telling her it was her own; that if this tally did not belong to the plaintiff, the gift would be of little value; that he never would have uſed ſo much ſolemnity in the giving of it to her, if there had been nothing in it; that it was ſtrange he ſhould call up two of his ſervants, and ſo often aſk them, if they remembered it, if he had given her nothing but an old hair trunk.

Then as to the *Donatio Cauſâ Mortis*, they agreed it was not to take effect till his death, but when that happened, it took effect, *ab initio*, from the donation made; that the revocation of all former wills could not revoke that, and cited *Bracton* and *Juſtinian's Inſtitutes* of the ſeveral ſorts of donations *Cauſâ Mortis*; that by them it appeared, ſuch donation had no dependance on the will; that if the donor died firſt, it was an abſolute gift, but if the donee died firſt, then indeed it was to return back to the donor, and not to go to the executors or repreſentatives of the donee; that this tally ſhould be preſumed to be in the trunk at that time, and to preſume the plaintiff put it in after, would be
303 to preſume her guilty of a fraud, * which is a preſumption againſt law and equity, and therefore it lay on the other ſide to prove it was put in after.

That the taking no notice of this tally in his will, was an argument that he did not look upon it as any part of his eſtate, but given away before; that upon opening of the trunk this tally was found in it, and the ſeveral relations and others preſent were then ſatisfied of the plaintiff's right thereto, however they had been adviſed ſince, and therefore it was prayed the decree might be affirmed.

Lord Chancellor ſaid, you agree that a *Donatio Cauſâ Mortis* is a gift *in præſenti*, to take effect *in futuro*, after the party's death, as a will, and that it is revokable during his life, as a

will

will is, and ſo it differs in nothing from a will, for it is not a preſent ſubſtantive gift; and therefore he thought that this caſe conſiſted but of two points:

1*ſt*, Whether there be ſufficient evidence to prove that the tally was in the trunk at the time of the gift.

2*dly*, Whether this will were not a revocation of it.

As to the 1ſt, he premiſed, that theſe ſorts of donations, eſpecially where they were of the ſame kind with what was given by the will, ought to be fully proved in all their circumſtances; otherwiſe they were not to be countenanced, becauſe it would open a way to perjury and fraud greater than the ſtatutes already in force had provided againſt: that here the plaintiff had not proved, by any one witneſs, that this tally was in the trunk at the time of the gift; that if it had been ſo, ſurely the teſtator would then, or when he had occaſion ſo often after, have told the witneſſes of it; that it was ſtrange he ſhould bid them take notice of the trunk, and not mention the tally, which was the principal thing in it; that all the plaintiff proved upon this ſcore was, its being there when the trunk was opened, which was three years after the gift, and four days * after the teſtator's death; that he ſet there to condemn frauds, and therefore might preſume them, unleſs they proved the contrary. 304

As to the 2d point, Whether the will were not a revocation, he ſaid, it could not be properly called a revocation; but the 1000*l.* therein given ſhould be looked upon as a ſatisfaction of the 500*l.* given her by the firſt will, and the 500*l.* tally after that. One cannot be ſaid to revoke a debt by his will, but yet he may ſatisfy it, by giving a legacy of equal value; and ſince he had revoked all former wills, this 1000*l.* was a ſatisfaction equivalent to a revocation, and muſt go in recompence of the 1000*l.* he had before intended her, ſince ſhe could not prove he intended it otherwiſe; for if ſhe had, then the *Donatio Cauſâ Mortis* muſt have ſtood, and therefore the decree was reverſed.

*DE

Termino S. Mich.

1710.

In Curia Cancellariæ.

Caſe 236.

Clavell *verſus* Littleton & al'.

Poſt, 377. Gilb. Chan. 298. Gilb. Eq. Rep. 37. S. C. 2 Eq. abr. 57, c. 6. 481, c. 13. S. C. 1 Vern. 100. 464.

A ſettlement made by a perſon going beyond ſea, though voluntary, not to be controuled by a letter wrote by him afterwards to the truſtees.

SIR *Edward Littleton* having a wife, and one only daughter, and being to go to the *Eaſt Indies*, makes a ſettlement of his eſtate on four truſtees, whereby he limits to them a term of 1000 years out of part of his eſtate, upon truſt, that they ſhould, out of the rents, iſſues, and profits, raiſe and pay to his wife, during her life, 180*l. per ann.* if he ſhould ſo long continue beyond ſea; and 100*l. per ann.* to his daughter, for her maintenance till marriage; and then directs, that the truſtees ſhould, by demiſe, mortgage, or ſale of his eſtate, or ſo much thereof as ſhould be neceſſary for that purpoſe, raiſe the ſum of 5000*l.* for his daughter's portion, to be paid her within three months after her marriage, and leaves the deed in the truſtees hands.

About a month after, Sir *Edward* being on ſhipboard, in order for his voyage, writes a letter to his truſtees, wherein he expreſſes

expreſſes great concern for his daughter, and his deſire that ſhe ſhould marry well; takes notice, that he had limited 5000*l.* to her for her portion, but that he thinks his eſtate would be too * much loaded by ſo great a portion, and that he would 306
leave ſomething for himſelf in caſe things ſhould prove croſs; therefore directs, that if ſhe married a perſon of ſome profeſſion or trade, and of a good eſtate, that ſhe ſhould have 2000*l.* raiſed preſently, and the reverſion of ſome part of his eſtate after his death, which would make up her fortune in the whole about 5000*l.* but if ſhe married otherwiſe, he would not give her a farthing; and named one *John Vaughan*, with whom he forbids her marrying, calling him a ſorry, impertinent fellow, and expreſſed himſelf, that if ſhe married with him, or any ſuch, ſhe ſhould have nothing.

The plaintiff was a gentleman of 7 or 800*l.* *per ann.* and ſomewhat related to the family, and went to the coach with Sir *Edward*, and he then expreſſed great kindneſs for him, and deſired him to take care of his daughter; ſome time after Sir *Edward* was gone, the plaintiff makes his addreſſes to the daughter, who was then about 25 years of age, and marries her, and ſhe dies about a year after, without iſſue.

Thereupon the plaintiff brought his bill in this court againſt the truſtees, and others, to have the portion of 5000*l.* raiſed and paid to him, he having taken out letters of adminiſtration to her; but Sir *Edward Littleton* being then living, and not made party to the ſuit, the cauſe went off for that reaſon.

And now Sir *Edward* being dead, the cauſe was brought on again againſt the truſtees.

For the defendants it was inſiſted, that theſe inſtructions were in the nature of a letter of attorney to the truſtees, and impowered them to act as Sir *Edward* himſelf might have done, and that they ſtood in his place; and therefore, though he had made ſuch a proviſion for his daughter, yet it was merely voluntary; and if he had not gone beyond ſea, but had kept the deed by him in his own power, he might have cancelled it at pleaſure;

pleaſure; that theſe inſtructions were a kind of defeazance of
307 the deed, though there was no expreſs * power of revocation; that the ſame power he himſelf would have had, was by this letter transferred to the truſtees, and therefore the plaintiff ought to have applied to them for their conſent.

That Sir *Edward* deſiring him to take care of his daughter, was a kind of guardianſhip delegated to him, and could not be intended as any encouragement for him to marry her; and a guardian's marrying his ward is always looked upon as a breach of truſt; beſides, the plaintiff had made no ſettlement on her, and Sir *Edward*'s circumſtances are very much altered; he was indebted in conſiderable ſums of money to the *Eaſt India* company, and others, which it was feared his eſtate would not be ſufficient to anſwer; that theſe inſtructions ought to be allowed to explain his intent; and if a man purchaſes an eſtate by a particular, but in the conveyance itſelf leaves out ſeveral of the parcels, this court will ſet it aſide.

A man purchaſing an eſtate by a particular, but in the conveyance itſelf part of the land is left out, equity will ſet it aſide.

My Lord Keeper was very unwilling to ſuffer the inſtructions to be read, ſaying, ſurely they can be no controul of the deed, eſpecially being made a month after the deed was executed, and cited a caſe of † *Clavering* and *Clavering* to that purpoſe, and ſaid, it would be a means to break through all ſettlements, if ſuch inſtructions or memorandums ſhould be allowed to explain or alter them; that the plaintiff was a gentleman of a conſiderable eſtate, and if the wife had ſurvived, ſhe would have been entitled to dower out of his eſtate, though no ſettlement had been made; that as to creditors, this deed would be voluntary, but they were not hurt by this decree, having no bill to ſet it aſide; that at preſent he could make no other decree, but that the whole 5000 *l.* ſhall be raiſed and paid to the plaintiff, with intereſt from three months after the marriage; but it being againſt the heirs at law, would not allow the plaintiff any coſts.

† Antè, 235. 2 Vern. 474.

Pye

* Pye *verſus* Gorges. Caſe 237.

1 Wms. 128. S. C. 387. 2 Wms. 678. Caſes temp. Talb. 252. 1 Eq. abr. 384, pl. 1. S. C. 2 Eq. abr. 747, c. 6. 748, c. 2. 2 Salk. 680. S. C. 1 Vezey, 95. 524. 1 Atk. 614. 3 Atk. 24. 754. Brown's Rep. 109. S. C. cited. 1 Brown's Parl. Caſes, 359. S. C.

IN this caſe my Lord Keeper declared his opinion clearly to be, that if truſtees, in a ſettlement to ſupport contingent remainders, join with the tenant for life in any conveyance to deſtroy the contingent remainders before they come *in eſſe*, that this was a breach of truſt in them, and beſides he ſhould make no ſcruple to ſet aſide the conveyance.

Truſtees in a ſettlement to ſupport contingent remainders, joining with the tenant for life in any conveyance that will deſtroy ſuch remainders, are guilty of a breach of truſt, and equity will ſet it aſide.

*DE

Termino S. Hillarii,

1710.

In Curia Cancellariæ.

Caſe 238. Croſby *verſus* Jonathan Middleton, Colliſon, & al'.

2 Eq. abr. 183, c. 1. S. C.

A. agrees to be bound in a bond, as ſurety to *B.* and ſigns and ſeals it accordingly; but by the neglect of the clerk, *A.*'s name was not inſerted: the obligee ſhews *A.* the condition and his name and ſeal, demands payment, and threatens to ſue him, unleſs he would give freſh ſecurity, which *A.* agrees to; but after finding the miſtake, refuſed, not being bound by law, yet equity will compel him.

A Bond for 500*l.* was ſealed and delivered by the defendant *Jonathan*, and his brother *Thomas*, for whom he was to be bound; but *Colliſon*, who drew the bond, left out *Jonathan*'s name. *Thomas* and the plaintiff had ſeveral dealings together for many years afterwards, and till *Thomas* broke and went to *Jamaica*, in a ſhip whereof the plaintiff was part-owner, and after that ſold his part to one *Rycocks*.

In *May* 1700, the obligee came to the defendant *Jonathan*, and having folded down the bond, ſhewed him the condition, with his hand and ſeal, and demanded the money, or freſh ſecurity, which he agreed to, and propoſed Mr. *Rycocks*, who demanding a ſight of the bond, found the miſtake, and diſſuaded the defendant from entering into the new bonds, Mr. *Bird*, a lawyer, adviſing him, that the bond was void againſt him.

Whereupon

Whereupon the plaintiff exhibits his bill to be relieved againſt the fraud in *Colliſon*, and to have a perfor mance of the defendant *Jonathan*'s laſt agreement. 310

Mr. *Vernon* for the plaintiff inſiſted, they were proper in a court of equity to be relieved againſt an accident or fraud, and that here have been frequent inſtances of relief in ſuch caſes as this.

Mr. *Dobyns* for the defendant inſiſted, that the party was never bound, had committed no fraud, but on the contrary was circumvented into the laſt agreement, for had he known that his name was not in the bond, he never would have treated, and urged the preſumption that it was paid, and the ſtaleneſs of the demand: if a man makes a voluntary deed, or gift, in writing, which is not effectual, this court will not aſſiſt; and they have not proved that they refuſed to lend *Thomas* the money unleſs the defendant would become bound for it, nor any treaty thereon, nor money lent, nor any demand or intereſt paid in 49 years; and that would be ſufficient time to ground a preſumption of payment, even at a *niſi prius*, if the parties had been able, and we prove the dealings of *Thomas* with the plaintiff almoſt ever ſince.

Lord Keeper. Your defence will not prevail, for his hand and ſeal is ſufficient evidence for equity to relieve againſt. I muſt decree it againſt you upon the firſt agreement; but ſince 49 years is not a ſufficient time to ground a preſumption in equity, as you would have, you may take an iſſue, and try payment or non-payment next aſſizes. *See 3. Wms. 396.*

Stephenſon *verſus* Hayward.

Caſe 239.
9 *February*.

Antè, 190, 191. 2 Vern. 435. 1 Eq. abr. 148, pl. 6. 10 Mod. 426. 16 Viner (tit. Payment) 282, pl. 6. 9.

ONE *Beeching* made a mortgage of his eſtate, and became indebted to *Hayward* in 60*l.* and then conveyed to *Streater*, another defendant in truſt, to pay the debt of *Streater*, and then all his other debts in average; then *Streater* tendered a conveyance of his eſtate for payment of his debts, ſhall be paid only in averag-

Lord Keeper *Harcourt*.

A creditor who obtains judgment after the debtor has made

the 311

the money to the mortgagee, which he refuſed, and afterwards aſſigned the mortgage to *Hayward*, and then *Hayward* obtained judgment againſt *Beeching* on his bond of 60 *l.* and then *Streater* ſold to the plaintiffs, who not having paid their purchaſe-money, preferred their bill againſt the mortgagees, and *Hayward*, to redeem.

My Lord Keeper ordered, that the plaintiffs ſhould redeem *Hayward*'s mortgage, and deduct their coſts out of the mortgage money, and that the judgment ſhould be paid but in proportion; for though *Hayward* had a title at law, and it was inſiſted that this judgment would affect the reſulting equity in *Beeching*, if there was more than ſufficient to pay his debts, and none of the creditors of *Beeching* were made parties to the ſuit; yet my Lord Keeper thought that the conveyance made for the payment of all *Beeching*'s debts was a good conſideration, and that being prior to the judgment, the ſubſequent judgment could not affect the eſtate; and though no creditors of *Beeching* were made parties, yet they might be brought in before the Maſter.

Termino Paſchæ,

1711.

In Curia Cancellariæ.

Meredith *verſus* Wynn. Caſe 240.

Poſt, 412. Gilb. Ch. 242. 1 Eq. abr. 70, pl. 15. and Gilb. Eq. Rep. 170. S. C. 2 Vern. 501. Caſes temp. Talb. 168. 3 Wms. 199 (n.) 2 Atk. 448.—See alſo, 2 Vern. 191. 2 Vezey, 676. Antè, 63. and references. 3 Atk. 20.

Where the wife's portion, charged by will on certain lands, purſuant to a power in ſettlement, ſhall go to the adminiſtrator of the huſband, and not to the adminiſtrator of the wife, though the huſband and wife are both dead, and the portion not raiſed.

IN this caſe the main queſtion was, Whether a wife's portion of 1250*l.* charged by will on ſuch lands, purſuant to a power in a ſettlement, ſhould go to the adminiſtratrix of the wife, as a choſe in action, or to the plaintiff, who was adminiſtrator of the huſband, they being both dead, and the money not yet raiſed?

As to which, the caſe was, that one *John Wynn*, on the marriage of his ſon *William*, ſettles ſeveral lands on that marriage, with a power for *John*, by writing or will, to charge the lands with 2000*l.* for ſuch uſes as he ſhould think fit; and after *John* by will, reciting this power, charges the ſaid lands with 2000*l.* to his two daughters *Dorothy* and *Barbara*, and directs that his ſon *William* ſhould, within two months after his death, give

them ſecurity for 1000*l.* apiece, being the 2000*l.* he had a power to charge; and if he ſhould refuſe ſo to do, then he made *Dorothy* and *Barbara* co-executors with *William*, and
313 likewiſe gave to his ſaid * two daughters 250*l.* apiece, beſides the ſaid 2000*l.* and dies.

William gives his two ſiſters bonds for their fortunes; *Barbara* intermarries with one *Richard Middleton*, and on the marriage treaty, articles were entered into, whereby *Richard* agreed to clear his eſtate, being 70*l.* *per ann.* of the incumbrances that were then upon it, within ſix months after the marriage ſhould be had, and for every 1000*l.* he ſhould receive of *Barbara*'s portion, to ſettle 10*l.* *per ann.* on her for her jointure for life, and to ſettle lands on the firſt and other ſons of that marriage. *Barbara* was no party, at leaſt never ſealed theſe articles: the marriage takes effect; *Barbara* dies within ſix months, without iſſue: *Richard*, on a ſecond marriage with one *Dorothy Pedell*, who had a portion of 1600*l.* in truſtees hands, by articles agrees to lay out the 1250*l.* he was entitled unto in right of his firſt wife, and this 1600*l.* when received, in the purchaſe of lands, to be ſettled on *Dorothy* for a jointure, and for a proviſion for the iſſue of that marriage, which marriage after takes effect; then *Richard* dies before he had got in either of the portions: the plaintiff his ſiſter takes out adminiſtration to him, and intermarries with the plaintiff *Meredith*, then comes to an agreement with *Dorothy*, whereby ſhe was to retain the 1600*l.* her own portion, and to releaſe all her right and title to the 1250*l.* or to any ſettlement to be made on her therewith, and this is reduced into writing, and executed: the defendant took out adminiſtration to *Barbara*; and againſt him and *John*, the grandſon and heir of old *John Wynn*, who had the land by deſcent, ſubject to raiſe this 1250*l.* was this bill brought, to have that portion raiſed and paid.

My Lord Keeper decreed it accordingly; becauſe the huſband in this caſe was a purchaſer of the wife's portion, by his agreement, to diſencumber his own eſtate, and ſettle a jointure on her, wherein he had proceeded ſo far, as to ſell ſome of his eſtate,

eſtate, in order * to diſcharge the reſt; and the death of the wife without iſſue, within the ſix months, prevented his making a ſettlement purſuant to the articles; ſo that he having done all in his power, and being guilty of no default, ought not to turn to his prejudice; and the plaintiff having now taken adminiſtration to him, ſtands in his place, and muſt have the benefit thereof; beſides, upon his ſecond marriage with *Dorothy Pedell*, he actually agreed, in conſideration of her portion, to lay out this 1250*l.* and ſettle lands on her; ſo that ſhe then became entitled to this money, as a purchaſer, for a valuable conſideration; and when ſhe, after her huſband's death, choſe to have her own 1600*l.* which belonged to the plaintiff as adminiſtratrix to the huſband, and the plaintiff agreed to it, by this the plaintiff likewiſe became a purchaſer of the 1250*l.* for 1600*l.* ſhe conſented to give up to the widow; and therefore decreed an account to be taken of the perſonal eſtate of *John*, the grandfather, and what that fell ſhort to be made up out of the real eſtate come to the defendant's hands; and if any real charges were paid out of the perſonal eſtate, the plaintiff to ſtand in their place for a ſatisfaction of this 1250*l.* out of the lands, to make ſo much as the perſonal eſtate remaining ſhould fall ſhort to pay. 314

Note; A caſe of † *Burnet* and *Kinaſton* was cited, where a voluntary diſpoſition by the huſband of his wife's fortune, before it was got in, being ſecured by mortgages, bonds, *&c.* ſhould not bind the wife, or her repreſentatives, after his death; but here the huſband was a purchaſer thereof for a valuable conſideration. † 2 Vern. 401. Antè, 118.

Another point of this caſe was, that Serjeant *Owen Wynn* had by his will given to *Barbara* 100*l.* as a legacy, and another perſon had likewiſe by his will given her a legacy of 50*l.* and of both theſe wills *John*, the father of *Barbara*, was executor; and whether the 1250*l.* given by the father ſhould go in ſatisfaction of theſe two legacies of 100*l.* and 50*l.* was the queſtion. Antè, 236. Where a deviſe ſhall be a ſatisfaction for what is due to the deviſee.

315 *It was argued by Mr. *Vernon*, and ſo reſolved by the court, without much oppoſition on the other ſide, that this could not be taken to be in recompence or ſatisfaction of thoſe two legacies, becauſe there was no legacy given particularly to *Barbara*; but the 2000*l.* he had a power of charging was given equally to his two daughters; and if this ſhould be a ſatisfaction of *Barbara*'s two legacies, ſhe would not have an equal ſhare of the 2000*l.* ſince thereby ſhe would loſe the other two legacies given her by the other perſons; and his giving the 2000*l.* to his two daughters, equally, ſhews that he intended to make no difference between them as to the ſhares they were to take.

* D E 316

Termino S. Mich.

1711.

In Curia Cancellariæ.

Hyde *verſus* Hyde. Caſe 241.

1 Coke's Inſt. Harg. ed. 89. b. 171. b.

IN this caſe no diſpute was made, but that an infant male of 14 years, and a female of 12 years, might make a will of the perſonal eſtate; and it was ſaid to be ſo agreed by my Lord Keeper *Wright*, in a caſe of *Sharp* verſus *Sharp*, wherein they followed the rule of the civil law of *Juſtinian*, as at thoſe ages they might conſent to marriage.

An infant male may make a will of his perſonal eſtate at 14, a female at 12.

2 Mod. 315.

Jones *verſus* Weſtcomb. Caſe 242.

See as to this case 3. Burr. 1623.

31 Oct. 1711.

Gilb. Eq. Rep. 74. S. C. 1 Eq. abr. 245, pl. 10. S. C. 8 Viner Abr. 103, pl. 53. 2 Str. 1092. 2 Eq. abr. 294, pl. 24. 1 Salk. 415. 3 Levinz, 125. 1 Vezey, 421. 3 Atk. 284. 317. Fearne's Cont. Rem. 400. 406, &c. Douglas, 63. 75.

THIS was a caſe wherein my Lord Keeper took time to conſider, before he would give his judgment, and was this:

A. deviſed a term for years to his wife for life, and after her death to the child ſhe was then *enſient* with; but if ſuch child died before 21, then he deviſed one third part of the ſaid term to his wife, whom he made executrix. The wife not being *enſient* at the time of the deviſe, held, 1ſt, That the deviſe to her was good, though the contingency never happened; 2dly, That ſhe ſhould have the undiſpoſed ſurplus of the perſonal eſtate, and not to go in a courſe of adminiſtration.

A man poſſeſſed of a long term for years, by his will deviſed it to his wife for life, and after her death to the child ſhe was then *enſient* with; and if ſuch child died before it came to the age of 21, then he deviſed one third part of the ſaid term to
317 his wife, * her executors and adminiſtrators, and the other two thirds to other perſons, and made his wife executrix of his will, and died.

This bill was brought againſt her by the next of kin of the teſtator, to have an account and diſtribution of the ſurplus of his eſtate, not deviſed by his will.

And two queſtions were made; 1ſt, Whether the deviſe to the wife of one third part of the term were good, becauſe it happened ſhe was not then *enſient* at all, and ſo the contingency upon which the deviſe to her was to take place never happened.

Antè, 12. 92. 169. 231. Poſt, 566. The other queſtion was, Whether this term being part of the perſonal eſtate, and expreſsly deviſed to her for life, with ſuch other contingent intereſt on the death of the ſuppoſed *enſient* child before 21, ſhould ſhut her out from the ſurplus of the perſonal eſtate, which belonged to her as executrix, and ſo the ſurplus go in a courſe of adminiſtration, to be diſtributed amongſt the plaintiffs as next of kin.

As to the firſt point, my Lord Keeper now delivered his opinion, that though the wife was not *enſient* at the time of the will, yet the deviſe to her of ſuch third part of the term was good.

And as to the other point, diſmiſſed the plaintiff's bill, and ſo let in the executrix to the ſurplus of the perſonal eſtate, *notwithſtanding the deviſe to her of part as aforeſaid.*

Stapleton

Stapleton *verſus* Cheales. Caſe 243.

Antè, 109, and references. 1 Eq. abr. 295, pl. 4. and 2 Vern. 673. S. C. Gilb. Chan. 268. 1 Salk. 415. 2 Vern. 199. 508. 1 Wms. 783. 2 Wms. 277. 610. 3 Wms. 138. 2 Atk. 127.

A legacy deviſed to an infant, payable or to be paid at the age of 21, is an intereſt veſted, ſo that it ſhall go to the executors or adminiſtrators of the infant, though he dies before that age; otherwiſe, if deviſed to one at 21, or if, or when he ſhall attain the age of 21.

IN this caſe it was urged by counſel at the bar, and agreed by the court, that if a legacy be deviſed to one generally, to be *paid* or *payable* at the age of 21 years, or any other age, and the legatee die before that age, yet this was ſuch an intereſt veſted in * the legatee, that his executors or adminiſtrators may ſue for and recover it; and with this agrees the law of the Spiritual Court, as was reported by Dr. *Awbery*, 1 *Leon.* 177. *Godb.* 182. for this is † *debitum in preſenti*, though *ſolvendum in futuro*; but if a legacy be deviſed to ‡ *one at* 21, *or if, or when he ſhall attain the age of* 21 years, and the legatee dies before that age, in this caſe the legacy is lapſed, and ſhall not go to his executors or adminiſtrators.

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† Vid. Swinburn, 311, 312, &c. ‡ 2 Vern. 417.

A legacy deviſed to an infant to carry intereſt at a certain rate, veſts in him ſo as to go to his executor or adminiſtrator.

§ 1 Vern. 462. 2 Vezey, 263. 3 Atk. 645.

§ But if in that caſe the teſtator had added, that in the mean time, or until the legatee attains that age, that he ſhall have intereſt for the ſaid legacy at ſuch a rate, from the time of his the teſtator's deceaſe, this ſubſequent clauſe explains the intent of the teſtator, ſo as to make the legacy, which was the principal, an intereſt veſted, which ſhall go to his executors or adminiſtrators, though the legatee die before that age, becauſe, if the principal were not due preſently upon the teſtator's deceaſe, *there could no intereſt accrue to the legatee at the time*; and this has been ſettled in *Cloberies* caſe, ‡‡ 2 *Vent.* 342, and in *Yates verſus Fettiplace*, and ſeveral other caſes in this court,

‡‡ Antè, 140.

But a portion to be raiſed out of a real eſtate, or a term for years, ſhall ſink in the inheritance.

But if ſuch portion were to ariſe out of lands, or a term for years, though it were limited to the party *generally* to be paid, or payable at ſuch an age, there, for the benefit of the heir, the portion ſhould ſink, and not go to the repreſentatives of the party ſo dying.

‖ Antè, 195. 1 Vernon, 92. 204. 321. 2 Ventris, 366. 1 Strange, 238.

The Maſter of the Rolls ſaid, the proviſion for payment of intereſt in the mean time, where the legacy was given generally at, or if, or when the party ſhould attain ſuch an age, that *that ſhould make it an intereſt veſted preſently* was an alteration of the law from what it was held in *Co. Lit.* 292, when he read that book (which was 50 years ago) though the reaſon of the law, as then taken, was becauſe there was no ſuch additional clauſe to explain it.

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Caſe 244.

* Maſon *verſus* Day.

1 Coke's Inſt. Harg. ed. 23. a. 2 Eq. abr. 494, c. 7. S. C. Gilb. Eq. Rep. 77. S. C. 1 Salk. 237. 1 Atk. 480. 2 Atk. 593.—Vid. 3 Wms. 99. Brown's Rep. 261.

A feme purchaſes a church leaſe to her and her heirs, for three lives, and dies, leaving an infant daughter; two of the lives die; the infant's guardian renews the leaſe, this is a new acquiſition, and ſhall go to the heirs of the part of the father.

Elizabeth Maſon having purchaſed a leaſe to her and her heirs, during three lives, from the archbiſhop of *Canterbury*, died, leaving *Mary* her daughter and heir, an infant; two of the lives being dead, and the ſurvivor in years, the guardians of the infant, out of the profits of that eſtate, take a new leaſe from the archbiſhop to the infant and her heirs, during three other lives, or during the life of the ſurviving *Ceſtuique Vie*, and two others, and then the infant dies without iſſue; and the queſtion was, Whether this ſhould go to the heirs of the part of the father, or to the heirs of the part of the mother?

It was argued, that it ſhould go to the heirs of the part of the mother, being a renewal only of the old leaſe, and under the old truſt; and if the infant heir had died without iſſue before renewal, living the ſurviving *Ceſtuique Vie*, there had been no queſtion of it, and ſo ought this new leaſe, being renewed out of the profits of the old leaſe.

But it was anſwered and reſolved by the Maſter of the Rolls, that this new leaſe was a new acquiſition, and veſted in the daughter as a purchaſer, and therefore ſhould go to the heirs of the part of the father, the renewal by the archbiſhop being gratuitous and ſpontaneous; and they differenced this caſe from a copyhold,

a copyhold, for there the lord is only a truſtee for the heir, and his admittance of him, though it be original, yet is only in virtue of the truſt repoſed in him by law for that purpoſe; and it was decreed accordingly.

Note; My Lord Keeper coming into court, and being aſked his opinion in it, ſaid, he was of the ſame opinion, to prevent a rehearing.

Termino S. Hillarii,

1711.

In Curia Cancellariæ.

Caſe 245. **Greenhill *verſus* Greenhill & al'.**

2 Vern. 679. S. C. 1 Eq. abr. 174, pl. 4. S. C. 2 Wms. 631. Brown's Rep. 227. 481.

A. deſires *B.* to purchaſe an eſtate for him; *B.* accordingly, the 10th of *April*, enters into articles for the purchaſe of an eſtate, part of which was cuſtomary lands, and covenants to pay the purchaſe-money on *Michaelmas* following, when conveyances were to be executed, and poſſeſſion given.

THIS cauſe came on upon an appeal from a decree made by my Lord Chancellor *Cowper*, and the caſe upon opening appeared to be this: One *Greenhill* deſired Mr. *Young* to purchaſe an eſtate for him, of about 10 or 12000*l.* value, in ſuch a place, and Mr. *Young* meeting with an eſtate, which he thought would anſwer expectation, agreed for the purchaſe of it; and thereupon, by articles, dated 10th *April* 1706, between the vendors and their wives of the one part, and *Young* of the other, the vendors agree to deliver poſſeſſion at *Michaelmas* following, and to execute ſufficient conveyances thereof, and *Young* covenants to pay the purchaſe-money at *Michaelmas*, when poſſeſſion was delivered.

In *June* *A.* made his will, and thereby deviſed all his perſonal eſtate to be ſold, and the money to be laid out in the purchaſe of lands, to be ſettled on *J. S.* and deviſes to him likewiſe all his lands of inheritance, having no others than thoſe agreed to be purchaſed. *A.* died before any conveyance executed, but without any new publication of his will; the lands paſs by this deviſe, and no ſurrender neceſſary of the cuſtomary lands, *A.* having only an equitable intereſt in them.

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In *June* afterwards, Mr. *Greenhill*, for whom this eſtate was purchaſed, makes his will, and thereby deviſes all his perſonal eſtate to be ſold, and the money * to be laid out in the purchaſe of lands, to be ſettled, *together with his freehold eſtate*, on the plaintiffs; and in another part of his will deviſed all his lands of inheritance to the plaintiffs, and their heirs. At *Michaelmas* following poſſeſſion was accordingly delivered to *Young*, and the money paid, but conveyances were not executed till about a year after; then *Greenhill* dies without any new publication of his will, and the plaintiffs brought this bill againſt *Young* and the heir at law, to have conveyances executed to them purſuant to the deviſe. Some part of the eſtate was cuſtomary, and lay in *Cornwall*, and by the cuſtom there, a ſurrender to the uſe of his will was neceſſary to paſs ſuch lands, though otherwiſe they paſſed by leaſe and releaſe, as lands at common law, and ſo were not copyhold. The defendant *Young* by his anſwer confeſſed the truſt, and the queſtion upon this caſe was, Whether this will was ſufficient to paſs the truſt of theſe lands? And my Lord Chancellor *Cowper* decreed it was. 321

But now it was argued by Sir *Joſeph Jekyll* and Mr. *How*, that this decree ought to be reverſed: they took a diſtinction between an agreement for the immediate purchaſe of lands, and ſuch agreement for the future purchaſe thereof, as this was; they agreed, that if the articles had been for the preſent purchaſe of theſe lands, that the vendor had been a truſtee preſently for the purchaſer, and then ſuch deviſe of them had been good in equity; but here the poſſeſſion was not to be delivered till *Michaelmas* following, nor was any money to be paid before that time, and then the purchaſer had no power to deviſe them ſooner, no more than a deviſe of lands which a man ſhould, after purchaſe, would be good, as has been ſettled in the caſe of † *Bunker* and *Cook*, which was adjudged in *B. R.* and *C. B.* and afterwards affirmed upon a writ of error in the Houſe of Lords; ſo if a man had a judgment or ſtatute againſt another, though this would bind the lands of freehold or inheritance from the time of * the judgment given, or the ſtatute acknowledged, yet 322

† 1 Salk. 238. and 2 Eq. abr. 295. 1. S. C.

yet the conuzee of the judgment or ſtatute has no ſuch intereſt as he can deviſe before execution actually taken out.

It was likewiſe urged, that theſe cuſtomary lands could not paſs by the will for want of a ſurrender previous thereto.

But it was argued on the other ſide, by Mr. Solicitor General and Mr. *Vernon*, in ſupport of the decree, that theſe lands were bound immediately from the execution of the articles; that the poſſeſſion not being to be delivered till a future time, made no difference in equity; that if Mr. *Greenhill* had died before *Michaelmas*, the equity would have deſcended to his heir, and that the heir might have brought a bill againſt Mr. *Greenhill*'s executors to compel the payment of the purchaſe-money out of the perſonal eſtate; that in this caſe the money was bound by the covenant, and if the plaintiffs ſhould not have the lands, they would loſe both money and lands too; for if the money had been at liberty, that would have paſſed by this will to the plaintiffs; but now that being bound by the covenant, if they cannot have the lands, they muſt loſe both; that this caſe was quite different from the caſe of *Bunker* and *Cook*, becauſe here the lands were immediately bound by the articles, and were in equity as much the teſtator's, as if he had been immediately let into poſſeſſion.

† Vid. Douglas, 719.

† And as to the cuſtomary lands, no ſurrender was neceſſary; for even in caſe of copyhold, though to paſs the lands themſelves a ſurrender to the uſe of his will might be neceſſary, yet the *Ceſtuique Truſt* could make no ſuch ſurrender, for he had no eſtate in the lands; and if copyhold lands were in mortgage, yet the mortgagor might deviſe the equity of redemption without any ſurrender, for he had no eſtate in them whereof to make any ſurrender, and for this point the other ſide gave it up.

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* Lord Keeper ſaid, he ſaw no reaſon to vary this decree; he thought ſuch future intereſt was deviſeable, as well as if it had been in poſſeſſion, and that the lands and money were mutually bound by the articles, and that the heir might have compelled

pelled the executors to have paid this money in caſe there had been no will, and therefore affirmed the decree.

Note; It did not appear in this caſe, that the teſtator had any other eſtate of freehold or inheritance, and therefore the deviſe in ſuch manner ſufficient to deſcribe this eſtate, ſo as to carry it by the will.

Gibbs *verſus* Barnadiſton. Caſe 246.

Vid. 2 Wms. 686. Caſes temp. Talb. 21. Poſt, 421. Fearne's Cont. Rem. 304. 341. Brown's Rep. 170.

IN this caſe it was held clearly, and decreed, that a deviſe of a perſonal eſtate to one and his iſſue, or to one, *and if he die without iſſue*, remainder over to another, that the deviſe over is void, and the whole intereſt veſted in the firſt deviſee, ſo as to be liable to his debts; and Mr. *Vernon* ſaid, † the reaſon that a deviſe over of ſuch perſonal eſtate upon a life barely was good, was, becauſe in conſtruction of this court the firſt deviſee had but the uſe of it, and not the entire property‡.

Deviſe of a perſonal eſtate to one and his iſſue, or to one, and if he die without iſſue, remainder over, the remainder is void. † 1 Vern. 59. 2 Vern. 245. 332. 1 Wms. 1. 1 Eq. abr. 301. Shephard's Touchſtone, 112.

Coleſworth *verſus* Brangwin & al', executors of Henry Derby. Caſe 247.

Antè, 12. 81 and 92.

J. S. having a debt of 50*l.* owing to him from the defendant, did by his will forgive him that debt, and gave him 50*l.* more, and ſome houſehold goods to the value of 100*l.* ſo that in all he gave him about 200*l.* and made him and the plaintiff executors, and died without making any diſpoſition of the ſurplus of his perſonal eſtate, which was conſiderable.

A. made *B.* and *C.* executors, and deviſed ſeveral legacies to *B.* but made no diſpoſition of the ſurplus of his perſonal eſtate, the executors ſhall come in equally for their ſhare of the ſurplus, notwithſtanding the legacies deviſed to one of them; but if a bill had been exhibited by the next of kin, *Q.* Whether they ſhould not both be conſidered as truſtees as to the ſurplus.

* And now the plaintiff brought this bill againſt the other executor, for an account of the perſonal eſtate, and that he might have the ſurplus to himſelf, upon pretence that the teſtator having given the other executor theſe ſpecific legacies, intended 324

‡ It has been ſo held in former caſes, but in the modern authorities Mr. *Vernon*'s poſition has been denied.—Vid. *Butterfield* v. *Butterfield*, 1 Vezey, 133. 154. and *Daw* v. *Pitt* and *Weſtern*, Fearne's Cont. Rem. 347.

him

him no more, and therefore that the whole ſurplus would belong to him.

For the defendant it was inſiſted, that the plaintiff was a mere ſtranger, and the defendant a near relation of the teſtator; that he gave him theſe legacies only that he might in all events be ſure of ſomething; that he took theſe legacies in another capacity than executor, and therefore they could not exclude him of his ſhare of the ſurplus, which the law caſt upon him as executor.

My Lord Keeper was clearly of this opinion, and ſaid, it was a much greater queſtion with him, whether this deviſe of particular legacies to one executor, ſhould not exclude both from any ſhare of the ſurplus, becauſe both came in but in repreſentation of the teſtator, and made but as one perſon; and, therefore, ſuppoſe the defendant had been made ſole executor, he made it a great queſtion, whether this legacy ſhould not have excluded him from the ſurplus; indeed the reaſon urged againſt it is, that if no ſuch legacy had been given, he would have come in for the whole, and therefore his giving him a part only, ought not to exclude him from the reſidue, which, without any ſuch deviſe of part, the law would have thrown upon him; but the caſe of † *Foſter* and *Munt* had ſettled this long ſince, and though that caſe had of late been ſhaken in the caſe of the ‡ *Dutcheſs of Beaufort, and in Littlebury*'s caſe, both in the Houſe of Peers, yet they were becauſe the legacy given to the executor was no beneficial legacy; and ſo a caſe of *one Atkinſon* at the Rolls, that 10*l.* given to an executor for mourning was no beneficial legacy, ſo as to exclude him from the ſurplus, becauſe mourning was a decency required upon * ſuch an occaſion, but this legacy here was a beneficial one.

† 1 Vern. 473.

‡ 2 Vern. 648. *Wingfield* v. *Atkinſon*, 1711. S. C. 2 Vezey, 673. S. P.

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But this not being the point in queſtion, he made no decree concerning it, but decreed the executors ſhould come in equally for their ſhare of the ſurplus of the perſonal eſtate, notwithſtanding theſe ſpecific legacies to one executor.

Note;

None; If the law be as has been lately held, this ſeems no contradiction to *Foſter and Munt*'s caſe, which † was decreed only on the fraud in the executor, as the Lord *Guernſey* declared.

1 Vernon, 473. 1 Eq. abr. 246, pl. 1. S. C.

Povey *verſus* Brown, Amhurſt, & al'. Caſe 248.

IN this caſe one *Selby*, uncle to the defendant's wife, had by his will given her 1000*l.* legacy, whilſt ſhe lived ſole; afterwards, on a treaty of marriage with the defendant, it was agreed by articles, that 700*l.* of this legacy ſhould be applied towards payment of his debts; after the marriage the defendant, without his wife, aſſigns the remaining 300*l.* to the plaintiffs, who were creditors likewiſe; and they brought this bill againſt the defendant and his wife, and the executors of *Selby*, to have a ſatisfaction of their debts out of the remaining 300*l.* and it was decreed that an account ſhould be taken, and upon the plaintiffs proving themſelves real creditors, and that the aſſignment was *bonâ fide*, they were to have a ſatisfaction accordingly, and the reſidue, if any, of the 300*l.* was to be put out for the benefit of the wife.

2 Eq. abr. 132, c. 1. S. C. Gilb. Eq. Rep. 80. S. C.

Whithill *verſus* Phelps. Caſe 249.

Poſt, 505. 1 Eq. abr. 157. 3. S. C. Gilb. Eq. Rep. 81. S. C. 1 Wms. 634. 3 Wms. 15. 320. 2 Vezey, 592. 1 Atk. 402. 2 Atk. 644. 3 Atk. 528. 2. Bro. 95.

THE caſe upon opening appeared to be thus: One *Mary Phelps*, widow of *Charles Phelps*, having a conſiderable fortune, and ſeveral children, on treaty * for a ſecond marriage with one *John Whithill*, agreed he ſhould only have 600*l.* of her fortune, and the reſidue to be ſettled for her ſeparate uſe, and after her death for the benefit of her children; and accordingly an indenture was prepared and executed before marriage, whereby ſhe, with his aſſent, aſſigns over her fortune to truſtees, in truſt, that ſhe ſhould receive the profits of it for her own

A freeman of *London*, in conſideration of 600*l.* covenants, that if his wife ſurvived him, his executors or adminiſtrators ſhould pay her 600*l.* out of his perſonal eſtate; this is ſuch a compoſition as will exclude her from any part of the cuſtomary ſhare.

† This appears to be miſrepreſented.—Vid. Poſt, 567.

own ſeparate uſe, during her life, and after her death that the ſame ſhould go and be divided equally amongſt her children; and *Whithill*, in conſideration of the ſaid intended marriage, and marriage portion of 600 *l.* makes a ſettlement on her, and at the end of the deed covenants, that if the ſaid *Mary* ſhould ſurvive him, then his executors or adminiſtrators ſhould pay and deliver to the ſaid *Mary* 600 *l.* out of his perſonal eſtate. The marriage takes effect, *Whithill* dies without iſſue in 1709, and about a year after *Mary* makes her will, and the defendant her ſon executor, and dies; the defendant likewiſe obtained adminiſtration to *Whithill* the huſband; but that was afterwards revoked and granted to the plaintiff his mother, who brought this bill for an account and diſtribution of the inteſtate *Whithill*'s eſtate. The defendant by his anſwer inſiſted, that *Whithill* was a freeman of *London*, and therefore on his death the widow was entitled to the 600 *l.* in the firſt place, purſuant to the marriage agreement, and to a full moiety of the remaining perſonal eſtate, as his widow, by the cuſtom of *London*, and to a moiety of the remaining moiety by the Statute of Diſtributions, and now ſhe being dead, the defendant, as her executor, ſtood in her place, and had the ſame right as ſhe herſelf had.

It was argued for the plaintiff, that this 600 *l.* which the huſband had covenanted ſhould be paid her by his executors in caſe ſhe ſurvived, muſt be taken to be in ſatisfaction of her cuſtomary part, though there were no words to that purpoſe; that this was a compounding for ſuch cuſtomary part, and being before marriage, by * the cuſtom of the city bound her from demanding any more; that in this caſe ſhe had waved any right under the cuſtom, by making this particular proviſion beforehand: and Mr. *Vernon* cited a caſe of † *Lee* and *Pett*, decreed by my Lord Chancellor *Cowper*, where a man and a woman, before marriage, agreed by articles to ſettle 2000 *l.* each upon themſelves and their iſſue, and a covenant from the intended huſband, that if the wife ſurvived ſhe ſhould have 2000 *l.* to be at her own diſpoſal; the wife ſurvived, and the huſband being a freeman, this 2000 *l.* was decreed to be not only in ſatisfaction of, or as a compoſition for, her cuſtomary part by the cuſtom of *London*, but

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† Gilb. Eq. Rep. 95. Eq. abr. 157, pl. 4. S. C.

but alſo to exclude her from any ſhare upon the Statute of Diſtributions, the huſband there dying inteſtate; and that this cauſe ſtood now in the paper to be reheard, and though, perhaps, the court might not go quite ſo far now, yet certainly it ought to exclude her from any cuſtomary part.

On the other ſide it was endeavoured to diſtinguiſh this caſe from that which was cited; that here it was only her 600 *l.* back again; that this could be no compoſition for any ſhare ſhe might be entitled to of her huſband's perſonal eſtate, for then it ought to have come out of the huſband's perſonal eſtate; but here it was only giving her back her own again.

My Lord Keeper decreed it to be in ſatisfaction of her cuſtomary part, and took notice, that the deed was expreſsly worded in conſideration of the marriage and marriage portion, ſo that he was abſolute maſter of that 600 *l.* and therefore it muſt be looked upon to come out of his perſonal eſtate; but as to a moiety of the other moiety, upon the Statute of Diſtributions, there was no queſtion made of it, but that the widow would be entitled thereto, and an account was decreed accordingly.

Note; For the other moiety which belonged to the inteſtate, the cuſtom of *London* gives no directions * where there are no 328
children, and therefore that is wholly under the direction of the Statute of Diſtributions; but the cuſtom of the province of *York* extends to give ſuch moiety to the next of kin to the inteſtate.

And in the principal caſe the Maſter of the Rolls was of the ſame opinion, and took notice, that the deed was expreſsly mentioned to be made between the parties, citizens of *London*; ſo that the cuſtom of *London* might well be ſuppoſed to be in their view; and therefore this compounding for 600 *l.* in all events, exempted her out of the reaſon of the cuſtom, which was to provide for thoſe who would be otherwiſe left without any proviſion, and here ſhe would not truſt to any as to the cuſtomary proviſion, and therefore ought to have no benefit of it.

Caſe 250.

Bell *verſus* Commiſſary Hyde & Ux'.

3 Peer Wms. 38. S. C. 1 Eq. abr. 65, pl. 8. S. C. 2 Atkyns, 50.

Where a wife may be proceeded againſt without her huſband, he not being amenable by the proceſs of the court.

UPON a motion for diſcharging of the defendant's wife, who was taken up on an attachment for not appearing, and anſwering the plaintiff's bill, the caſe appeared to be this: The defendant's wife being a widow, and having a conſiderable fortune, upon the defendant's application to her in way of marriage, a ſettlement was made and executed, and the marriage took effect.

Some time after, the defendant being very much in debt, was arreſted, and the creditors were going on to take out execution, and ſeize his goods; but to prevent that, the wife gave a note, that if they would diſcharge the action (which was for 2000 *l.*) ſhe would pay the debt out of her own ſeparate eſtate, and accordingly the action was diſcharged.

But ſhe afterwards refuſing to make good her agreement, this bill was brought to enforce an execution thereof.

329 * The bill was brought againſt the huſband and wife, and *Subpœnas* taken out againſt both, and actually ſerved upon the wife at her houſe, but the huſband could not be found; after which, neither the huſband nor wife appearing, an attachment was taken out againſt both, and the huſband ſtill keeping out of the way, the wife was taken upon the attachment.

And ſhe now moved to be diſcharged, on ſeveral affidavits, that her huſband was actually gone to *Rotterdam* in *Holland*, before the filing of the bill; and therefore the proceſs againſt her without her huſband was irregular, and that ſhe ought to be diſcharged; and it was ſaid, that at law there could be no proceeding againſt the wife without her huſband, and that equity followed the law in this particular.

On the other ſide it was ſaid, that the wife was not to be conſidered in this caſe as a feme covert; that ſhe having an eſtate ſettled on her before marriage for her ſeparate uſe, this made her

as a feme ſole, and a ſeparate perſon from her huſband, and therefore her agreement was binding upon her; that they had done all they could to bring in the huſband; they had made him a party in the bill, taken out a *Subpœna* againſt him and his wife, and for not appearing they had taken out an attachment likewiſe againſt both; that if they could not in this caſe proceed againſt the wife, the juſtice of this court would be eluded, and it would be very eaſy for any man to ſettle all his eſtate upon his wife, and then get out of the way, and ſo bid defiance to his creditors; and Sir *Joſeph Jekyll* ſaid, it was a ſaying of a very great man, *boni judicis eſt ampliare juriſdictionem*, and he thought to extend the arm of juſtice further than uſual, when otherwiſe there would be a failure of juſtice, was the duty of every court.

That in ſome caſes a woman may ſue without her huſband, and nothing was more common than for a wife in this court to ſue even her huſband, and therefore ſurely in this caſe the plaintiffs ought not to * loſe the benefit of the wife's agreement, by her ſending her huſband abroad, and cited a caſe of † *Dubois* and *Hole* to this purpoſe. 330

† 1 Eq. abr. 65. 7. and 2 Vern. 613. S. C.

But my Lord Keeper ſeemed to be of opinion, that the proceſs in this caſe without the huſband was irregular, and that they ought to ſtay till the huſband's return, when they might renew the proceſs againſt both; to which it was anſwered, ſuppoſe the huſband never return, muſt they then be totally deprived of the benefit of this agreement? Upon which my Lord Keeper ſaid, he would aſk the Maſter of the Rolls his opinion, and be governed by that.

Afterwards the Maſter of the Rolls coming into court, was clearly of opinion, that the proceſs in this caſe without the huſband was regular; that the huſband was joined in the ſuit only for conformity; and ſaid, a woman by her marriage did not loſe her underſtanding or diſcretion, but rather improved it by her huſband's teaching, and cited *Moor* verſus *Huſſey*, *Hob.* 95, where ſeveral caſes are cited, wherein a feme covert without her huſband ſhall be chargeable, and ſaid, the practice of this court

had been conſtantly ſo; upon which the defendant prayed time till the firſt day of next term to put in her anſwer, and on her entering her appearance with the regiſter, and paying coſts of the motion, it was granted, and ſhe to be diſcharged out of cuſtody.

Note; Mr. *How* in this caſe urged, that the defendant ought not to be heard to move for her diſcharge, becauſe ſhe not having appeared by her clerk in court, was not at all in court, but a perfect ſtranger, and therefore could not regularly make any application by her counſel till ſhe had brought herſelf into court, by directing her clerk to enter an appearance for her; but of this no notice was taken either by the court or counſel on the other ſide.

Termino Paſchæ,

1712.

In Curia Cancellariæ.

Anonymous. Caſe 251.

THE plaintiff's bill being diſmiſſed with coſts, and coſts taxed to 160 *l.* a *Supbœna* was awarded againſt him to pay thoſe coſts, and for not obeying it an attachment; upon which attachment the ſheriff of *Leiceſter*, to whom it was directed, took bail, and returned a *Cepi Corpus*.

The ſheriff cannot take a bail-bond upon an attachment for not paying coſts, but in ſuch caſe a meſſenger is to go to bring in the party.

And now, upon this return, a motion was made for a meſſenger to bring in the plaintiff, and it was urged to be the courſe of the court, that a meſſenger ſhould go in all caſes where the ſheriff takes bail, where the party is not bailable, as in this caſe he is not, and the rather, for that in this caſe the bail-bond was taken of a member of parliament, againſt whom, the parliament being now ſitting, they could have no remedy; and one *Hawkins*'s caſe was cited, where, in a like caſe, a meſſenger was ſent to bring in the party, and ſo it was ordered in this caſe.

Caſe 252. * Edwards *verſus* Faſhion.

1 Eq. abr. 292, pl. 9. S. C. Antè, 163. 167. Poſt, 491.

A. having a mortgage for years, deviſes, after his debts paid, all his perſonal eſtate to his two daughters, *equally to be divided between them*; after the debts paid, the daughters purchaſe the equity of redemption and inheritance of the mortgaged premiſſes to them and their heirs: this is a tenancy in common, and not a joint-tenancy.

THE caſe was ſhortly this: A man having a mortgage for years, makes his will, and thereby deviſes all his perſonal eſtate, of what nature ſoever, to his executors, in truſt, for the payment of his debts, and afterwards deviſes the reſidue and overplus of his ſaid perſonal eſtate to his two daughters, equally to be divided between them, and dies.

The debts being ſatisfied, the daughters contract with the mortgagor for the purchaſe of the equity of redemption, and inheritance of the mortgaged premiſſes to them and their heirs, and articles are executed on both ſides accordingly, and a bill brought by the daughters for a ſpecific execution of thoſe articles, and a decree obtained for that purpoſe; then one of the daughters makes her will, and thereby deviſes her moiety, ſhare, and intereſt in the ſaid premiſſes, to the plaintiff, who brought this bill to be relieved againſt the proceedings of the other daughter, who claimed the whole inheritance by ſurvivorſhip, as a joint-tenancy, and had ejected the plaintiff; and the queſtion was, Whether this purchaſe of the inheritance were a joint-tenancy, or a tenancy in common?

The Maſter of the Rolls decreed it to be a tenancy in common, for ſo was the mortgage deviſed to the two daughters, whereon this purchaſe of the equity of redemption and inheritance was founded; and therefore they having ſeveral and diſtinct intereſts, as tenants in common in the mortgage, and paying an equal proportion for the purchaſe of the equity of redemption and inheritance, ſhould have that in the ſame manner, and therefore the deviſe good.

Goodrick

* Goodrick *verſus* Shotbolt & al'.

2 Eq. abr. 473, c. 2. S. C. Gilb. Eq. Rep. 18. S. C. 1 Atk. 474.

THE caſe, as appeared upon the pleadings, was this: *William Shotbolt*, on his marriage with *Alice*, the daughter of one Mr. *Riſton*, gave a bond of 600*l.* to the ſaid Mr. *Riſton*, with a warrant of attorney to confeſs judgment thereon, and this judgment was defeazanced on payment of 300*l.* to *Alice*, in caſe ſhe ſurvived her huſband.

A. on his marriage, gave a bond of 600*l.* with a warrant of attorney to confeſs judgment thereon; defeazance on payment of 300*l.* to his wife, if ſhe ſurvived: afterwards ſhe joined with him in a conveyance by fine of his real eſtate; held that this extinguiſhed her right, or any *lien* created by this judgment on the real eſtate.

Afterwards, about the year 1706, the plaintiff agreed with *William Shotbolt* for the purchaſe of his whole eſtate for 900*l.* whereof 700*l.* was to be paid down; and in regard the ſaid eſtate was ſubject to an annuity of 20*l. per ann.* during the life of a certain perſon, it was agreed, that the plaintiff ſhould retain the other 200*l.* in his hands, to indemnify himſelf againſt the ſaid annuity, and that after the purchaſe compleated, he ſhould convey back the eſtate for a term for years, redeemable on his payment of the ſaid 200*l.* and intereſt, after the falling in of the ſaid annuity.

Accordingly *William Shotbolt*, and *Alice* his wife, by indenture of leaſe and releaſe, and fine, convey the eſtate to the plaintiff and his heirs, and the wife at the ſame time delivered up the bond to be cancelled.

Soon after the executing of theſe deeds and fine, in regard *William Shotbolt* was indebted to his brother *Battalion Shotbolt* in the ſum of 200*l.* and upwards, it was agreed, that for ſecuring that ſum, the plaintiff ſhould mortgage the ſaid eſtate to the ſaid *Battalion*, redeemable on his payment of the ſaid 200*l.* and intereſt, and accordingly the plaintiff executed a leaſe of the premiſſes, wherein reciting the annuity of 20*l. per ann.* and the judgment to *Riſton*; and that for indemnifying him againſt thoſe two ſums, it was agreed, upon this purchaſe, that he ſhould retain 200*l.* in his * hands; therefore he, by the direction of *William Shotbolt*, 334

mortgages the premiſſes to *Battalion* for a term of years, redeemable on payment of the ſaid 200*l.* and intereſt.

William dies, and *Alice* ſurvives him, and *Riſton*, the conuzee in the judgment, being likewiſe dead, ſhe takes out adminiſtration to him, and now would extend this judgment upon the plaintiff's eſtate. *Battalion Shotbolt*, the mortgagee, pretended, that he only had a title to the 200*l.* ſecured by the mortgage, and the plaintiff brought an ejectment, and recovered at law, upon bringing his money into court, the annuitant being dead; and he now likewiſe brought this bill, that on payment of the 200*l.* to ſuch of the defendants as had a right to receive the ſame, he might redeem and be let into the poſſeſſion of the eſtate.

The defendant *Alice*, by her anſwer, inſiſted, that the 200*l.* belonged to her by virtue of her judgment, which was prior to the defendant *Battalion*'s mortgage, and that this 200*l.* was all ſhe would be able to get for the 300*l.* that judgment was given to ſecure.

The defendant *Battalion* inſiſted, that the 200*l.* belonged to him as a creditor, by virtue of the mortgage, and that *Alice*'s title was extinguiſhed by the fine.

It was agreed on all hands, that the plaintiff ought to redeem on payment of the 200*l.* only, but whether *Alice* or *Battalion* had a right to receive it, was the queſtion; and therefore this bill was in the nature of an interpleading bill, that they might ſettle the right between themſelves, and ſo he not pay his money to a wrong hand.

For the defendant *Alice* it was inſiſted, that this 300*l.* was all the proviſion ſhe had; that it was expreſsly taken notice of in the mortgage, and the retaining of the 200*l.* was a ſecurity, as well againſt that, in caſe ſhe ſhould ſurvive, as againſt the annuity; that ſhe ſurviving her huſband, and having taken out
335 adminiſtration to her father the conuzee, and the * judgment being prior to the mortgage, had now a legal title to lay on her judgment, and that a court of equity ought not to take it from her.

But

But for the defendant *Battalion Shotbolt* it was inſiſted, that *Alice* joining in the fine with her huſband, this had extinguiſhed all her right by virtue of the judgment; that if ſhe herſelf had been conuzee, there had been no queſtion of it; for though a releaſe by a conuzee of all his right to the land of the conuzor will not be a bar, or prevent his taking out execution after, yet ſuch right may certainly be extinguiſhed; that as ſuch fine would have barred the conuzee himſelf, ſo her joining will in equity defeat the intereſt of her truſtee; that upon the fine ſhe was examined, and conſented to part with all her intereſt in the land; and if ſhe ſhould be allowed by this judgment to take back again any right to the land, this would be to derogate from her own grant.

They agreed, indeed, that her joining in the leaſe and releaſe would not extinguiſh her intereſt in the judgment, but the fine wherein ſhe joined carried away all her right and intereſt in the land; that at the levying of the fine ſhe delivered up the bond, and though that neither would not be ſufficient to bar her without the fine, yet it was an argument that ſhe relinquiſhed her ſecurity; that the reaſon of taking notice of the judgment in the mortgage was, becauſe that was ſtill ſtanding out as a legal lien upon the land; that her father being then dead, and ſhe not having taken out adminiſtration to him, it was proper for the purchaſer to ſecure himſelf, as far as he could, againſt it; that if it had been intended the ſecurity for 300*l.* ſhould have continued, the purchaſer would have retained 300*l.* in his hands for the purpoſe, and that 200*l.* only being retained, was an argument, they never intended the purchaſer ſhould be charged therewith, which was not an adequate ſecurity for the 300*l.*

* My Lord Keeper was clearly of this opinion, and decreed 336
the plaintiff ſhould be admitted to redeem, and ſhould have his coſts, and that the defendant *Battalion Shotbolt* had the right to the 200*l.* as an honeſt creditor, and decreed accordingly, and that the defendant *Alice* ſhould procure ſatisfaction to be acknowledged on the judgment.

Bottomley

Caſe 254.

Bottomley *verſus* Lord Fairfax.

Antè, 65, &c. 2 Atkyns, 526.

Gilb. Chan. 267. 1 Wms. 334. S. C. but not S. P. Caſes temp. Talbot, 139.

A man before his marriage veſts the legal eſtate in truſtees, in truſt for him and his heirs; equity will not aſſiſt the wife in recovering the dower.

IN this caſe it was clearly agreed, that if a huſband before marriage conveys his eſtate to truſtees and their heirs, in ſuch manner as to put the legal eſtate out of him, though the truſt be limited to him and his heirs, that of this truſt eſtate the wife, after his death, ſhall not be endowed, and that this court hath never yet gone ſo far as to allow her dower in ſuch caſe.

DE

Termino S. Trinitatis,

1712.

In Curia Cancellariæ.

Attorney General *verſus* Thompſon. Caſe 255.

Poſt, 367. Gilb. Chan. 275. 1 Eq. abr. 301, pl. 2. S. C. 2 Ventris, 346. 2 Wms. 21. 3 Atk. 101. 716. Brown's Rep. 387.

IN this caſe a difference was taken by Mr. *How*, and agreed to by the court, that if a father deviſes portions to his daughters, or younger children, to be paid or payable at their reſpective ages of 21 years, or any other time certain, without making any proviſion for their maintenance in the mean time, and dies, that in this caſe they ſhall have intereſt for their portions from his death till paid, becauſe the father was obliged to have provided for them, if he had lived.

Portions deviſed by a father to his younger children, payable at 21, or marriage, ſhall carry intereſt from his death till that time, if he made no other proviſion for them; but otherwiſe, if deviſed by a ſtranger, who is under no obligation to provide for them.

But if ſuch portions had been deviſed to them *by a ſtranger*, *to be paid* or payable at ſuch an age, in this caſe their portions ſhould not carry intereſt in the mean time, becauſe he being a ſtranger, was under no ſuch obligation to provide for them; and a caſe of *Brewin and Brewin* was cited to have been decreed in like manner,

Vid. 1 Wms. 783.

Ante, 195.

Eure

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Caſe 256.

* Eure *verſus* Howard.

2 Eq. abr. 700, c. 1. S. C. Gilb. Eq. Rep. 20. S. C. Poſt, 435. Fearne's Cont. Rem. 30.

THIS cauſe came on to be heard, by conſent, upon bill and anſwer, only for the opinion of the court, and, upon reading of ſeveral deeds, appeared to be this:

Where the mean remainders determine the eſtate for life, and reverſion being in the ſame perſon ſhall conſolidate.

Robert Howard, ſeiſed of an eſtate of inheritance, by indenture, in 1677, covenants to levy a fine thereof to one *Iler* and *Broadſtreet*, and their heirs, to the uſe of himſelf for life, and after, to ſuch uſes, intents, and purpoſes, as he ſhould, by any deed or writing under his hand and ſeal, executed in the preſence of two or more credible witneſſes, during his natural life, direct and appoint, and for want of ſuch direction and appointment, in truſt for him and his heirs, and a fine was levied accordingly.

Afterwards the ſaid *Robert Howard* intermarrying with one *Winifred*, with whom he had iſſue *Robert* his ſon, and the ſaid *Robert* the father being ſeiſed, in right of *Winifred* his wife, of other lands of inheritance, they, by indentures of leaſe and releaſe, in 1690, and fine duly levied thereupon, grant and convey theſe lands to truſtees and their heirs, to the uſe of *Robert* the father during his life, and after to *Winifred* during her life; remainder to the uſe of *Robert* the ſon, and the heirs male of his body iſſuing; remainder to the uſe of the right heirs of the ſurvivor of them, the ſaid *Robert* the father, and *Winifred* his wife, for ever.

Afterwards, upon the marriage of *Robert* the ſon with *Mary-Anne* his wife, one of the defendants, by indentures of leaſe and releaſe, 9 and 10 *July*, 1698, between *Robert Howard* the father, and *Winifred* his wife, and *Robert* their ſon, of the firſt part; *Ann Broadſtreet*, daughter and heir of *Broadſtreet*, the ſurviving truſtee in the deed of 1677, of the ſecond part; *Mary-Anne Wolf*, of the third part; and others, of the fourth and fifth part; in conſideration of a marriage intended * between *Robert*

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the

the ſon, and *Mary-Anne Wolf*, and of 4000*l.* portion, and other conſiderations, *Robert* the father, and *Winifred* his wife, and *Robert* their ſon, grant, releaſe, and convey ſeveral lands, tenements, and hereditaments, therein particularly mentioned (being as well thoſe whereof *Robert* the father was at firſt ſeiſed in right of *Winifred* his wife, as others whereof he was ſole ſeiſed) in fee, to truſtees and their heirs, to the uſes following; *viz.* as to part, to the uſe of *Robert* the father for 99 years, if he ſhould ſo long live; remainder to truſtees and their heirs, during his life, to ſupport contingent remainders; remainder to the uſe of *Winifred* for life; remainder to *Robert* the ſon for 99 years, if he ſhould ſo long live; remainder to truſtees during his life, to ſupport contingent remainders: and as to the other part, to the uſe of *Robert* the father, and *Winifred* his wife, for their lives, and the life of the longer liver of them; remainder to *Robert* the ſon for 99 years, if he ſhould ſo long live; remainder to truſtees and their heirs, during his life, to ſupport contingent remainders; remainder, as to other part, to *Robert* the ſon, in poſſeſſion, for 99 years, if he ſhould ſo long live; remainder to truſtees during his life, to ſupport contingent remainders; remainder to *Mary-Anne* for her life, for her jointure; remainder of the whole, and as the ſeveral eſtates before-limited ſhould reſpectively determine, to the firſt ſon of *Robert* the ſon, on the body of *Mary-Anne* to be begotten, and of the heirs male of the body of ſuch firſt ſon lawfully iſſuing, and ſo to the ſecond and other ſons in like manner; remainder to the heirs male of *Robert* the ſon; remainder to the right heirs of *Robert* the father, for ever.

Robert the father covenants, that he, and *Winifred* his wife, would levy a fine of all the ſaid lands to the uſes before mentioned; and by the ſame indenture, *Anne Broadſtreet*, by the direction of *Robert* the father, grants, releaſes, and conveys, and he ratifies and confirms all the lands, by the deed of 1677 limited to * *Iler* and *Broadſtreet*, and their heirs, to the uſe of *Robert* the father, for 99 years, if he ſhould ſo long live; remainder to truſtees during his life, to ſupport contingent remainders, with

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with other remainders over; remainder to the right heirs of *Robert* the father, for ever. A fine was accordingly levied, and the marriage took effect, and they had iſſue *William* a ſon, and *Winifred* a daughter; then *Winifred* the mother dies, and afterwards *Robert* the ſon dies, without other iſſue.

Robert the father, the 15th of *January*, 1706, makes his will, and thereby deviſes all his manors, lands, tenements, and hereditaments, in poſſeſſion, reverſion, remainder, or in expectancy, whatſoever, to *Charles Baggot* and *Richard Baggot*, and others, and their heirs, in truſt, by ſale or mortgage, to raiſe ſo much as would be ſufficient to pay his debts, and the legacies thereby given, and gives ſeveral legacies, to the amount of 3000 *l.* and upwards, and makes *Mary* his then wife executrix, and dies conſiderably indebted.

Some time after his death, *William the grandſon dies without iſſue*; and now this bill was brought by the creditors and legatees of *Robert* the grandfather, againſt *Mary* his executrix, *Mary-Anne Howard* and *Winifred* her daughter, *Charles* and *Richard Baggot*, and others, to have a ſatisfaction of their debts and legacies, purſuant to the will of old *Robert*.

The defendant *Mary-Anne Howard* ſets out the indentures of the 9th and 10th of *July*, 1698, and inſiſts in behalf of *Winifred* her daughter, that the remainder of all that was thereby limited to *Robert* the father for 99 years, with remainder to his right heirs, *veſted in Winifred her daughter, as heir to William her brother, as a contingent remainder by purchaſe, and ſo not ſubject to Robert the father's diſpoſal by will; and whether they were, or how many, and which of them were ſo ſubject, was the only queſtion.*

341 * *Firſt*, As to the lands limited to *Robert* the father for life, with the laſt remainder thereof to his own right heirs, there was little or no queſtion made of it, but that it was the old reverſion in fee in him, and conſequently liable to be diſpoſed of as he thought fit; but as to the other, limited to him for 99 years only, with ſuch remainder to his right heirs, there were very

ſolemn

ſolemn arguments how far he had a power over it, and this was divided into three points.

1ſt, Whether of thoſe lands, not compriſed in the deed of 1677, and whereof he was ſeiſed in fee in poſſeſſion at the time of the marriage ſettlement upon his ſon, remainder to his right heirs, ſhould be looked upon as his old reverſion, and ſo under his power of deviſing.

2dly, Whether of the lands compriſed in that deed of 1677, the remainder to his own right heirs, ſhould be looked upon to be void, and the old reverſion veſted in himſelf, and ſo paſſed by his will.

3dly, Whether the remainder to the right heirs of the ſurvivor of the ſaid *Robert*, and *Winifred* his wife, of her inheritance, limited by the deed of 1690, were ſo barred or deſtroyed by the deeds of leaſe and releaſe of 9 and 10 *July*, 1698, and the fine thereupon, levied by *Robert* the father, and *Winifred* his wife, as to be capable of being ſettled to the uſes therein limited; and if ſo, Whether the remainder to the right heirs of *Robert* the father, was ſo veſted in him as to be ſubject to his will.

As to the firſt point, it was argued by the Attorney and Solicitor General, and Mr. *Lechmere*, that this remainder to the right heirs of *Robert* the father was a contingent remainder, and veſted in his right heir by purchaſe, and was not part of the old uſe reſulting to himſelf, and conſequently not liable to his diſpoſition by will; and therefore the Solicitor General ſaid, this caſe differed entirely from the caſes of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, for in thoſe caſes there * was no diſpoſition at all made of the old uſe during his life, and therefore it ſtill continued in him, and then the remainder to his own right heirs, knit and conſolidated with that old uſe, which he had not diſpoſed of for his life, and conſequently his right heirs could not be purchaſers; and the reaſon they conſtrued the old uſe to continue in him for life, was, becauſe it might happen that all the eſtates might determine during his life,

Vid. Infrà, 345.

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life, and then there would be no perſon to take the freehold whilſt he lived, becauſe he could have no heirs till after his death; and ſince it might happen that all the eſtates might determine, and he made no diſpoſition of the uſe during his life, therefore the uſe during his life continued in him; and that, upon determination of the intermediate eſtates, being united and conjoined with the remainder to his right heirs, *made it one conſolidated fee in himſelf, and by conſequence his heirs muſt take by deſcent, and not by purchaſe*; but where the entire uſe was expreſsly limited out of him, during his life, ſo that by no poſſibility the intermediate eſtate can determine during his life, there the remainder to his right heirs is a good remainder, and they ſhall take by purchaſe, and not by deſcent; and he ſaid, this difference was taken and agreed to by the court in the caſe of † *Tippin* and *Coſon*, 4 *Mod.* 380, in which caſe the caſes of *Fenwick* and *Mitford*, and ‡ *Pibus* and *Mitford*, were all cited; and here, in the principal caſe, he has limited the uſe during his life to truſtees, to ſupport contingent remainders, and ſo has diſpoſed of the old uſe during his life; and conſequently there can be no old uſe remaining in him to unite with the remainder limited to his right heirs, and then they ſhall take this remainder as heirs by purchaſe: and Mr. *Lechmere* ſaid, he having limited ſuch eſtate to truſtees during his life, to ſupport contingent remainders, the law ſhall never, againſt his own expreſs limitation, bring back the uſe to him again during his life, for then it muſt take it out of the * truſtees, to whom he has by expreſs limitation given it during his life; and ſo *having left no uſe in himſelf during his life, he has no eſtate of freehold to unite and conſolidate with the remainder to his own right heirs, and conſequently they cannot take by deſcent from him, but muſt take as purchaſers, and then he had no power to ſubject this remainder to debts or legacies by will.*

† Fearne's Cont. Rem. 34. &c.

‡ 1 Ventris, 272.

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As to the ſecond point, Whether the remainder to his own right heirs of the lands, compriſed in the deed of 1677, was a void remainder, and veſted in himſelf as part of the old uſe, this they ſaid was a much ſtronger point; for beſides that the limitation

limitation to himſelf is but for 99 years, as the former limitations were, the legal eſtate of this part of the lands was ſtanding out in the truſtee, and then there can be no pretence of any reſulting uſe to him for his life, for nothing moved from him, the whole eſtate being in the truſtee, and paſſed from him to the ſeveral uſes; and therefore he being a ſtranger, might well limit the remainder to the right heirs of old *Robert*, ſo as to make them capable of taking by purchaſe, ſince there could be no uſe remaining in him after the ſettlement, when he had none before.

It was likewiſe urged ſtrongly, that for another reaſon the right heirs muſt be purchaſers of this part of the eſtate; for, by the deed of 1677, the uſe was limited to him but for life only; and, after his death, to ſuch uſes, intents, and purpoſes, as he ſhould direct or appoint; and for want of ſuch appointment, to his own right heirs; ſo that he had time during his whole life to make ſuch appointment, and conſequently the eſtate in the mean time muſt be lodged in the truſtees to ſupply ſuch appointment; and then he having only an eſtate for life in thoſe lands, could not make good any of the limitations in the ſettlement of 1698, beyond his own life; for ſuppoſe he ſhould afterwards have made an appointment purſuant to his power, this * muſt have taken place of the ſettlement, and defeated all thoſe uſes, as to this part of the land, becauſe he had power during his whole life to make that appointment, and conſequently during his whole life the eſtate muſt continue in the truſtees, to anſwer and ſupply that power, and ſo 10 *Co.* 85, expreſs in point. 344

They urged further, that this very ſettlement of 1698 was an actual appointment in purſuance of his power, for the heir of the ſurviving truſtee was a party to it, and joins in the conveying thoſe very lands; and it is ſaid to be by the direction and appointment of *Robert Howard* the father, who had ſuch power of appointing; and therefore it can be taken to be no other than an appointment in purſuance of his power; and then the eſtate lodging in the truſtees, to ſupply and anſwer ſuch appointment, when he limits the laſt remainder to his own

right heirs, they muſt take by virtue of the appointment, and conſequently muſt take as purchaſers, becauſe the eſtate was lodged in truſtees to anſwer ſuch appointment; and the father had nothing but the bare power of appointing the uſes, and ſo can never derive an eſtate by deſcent to his heirs, when he had no fee nor legal eſtate in himſelf, but a bare power of appointing the uſes, which muſt after draw out the poſſeſſion from the truſtees according to thoſe uſes.

As to the third point, it was argued, that the remainder of *Winifred*'s inheritance, limited to the right heirs of her, and *Robert* her huſband, was a contingent remainder; and *Robert* the father being the ſurvivor, the ſame veſted in his right heirs by purchaſe, and conſequently not ſubject to his diſpoſition by will: and they inſiſted, that the fine levied by *Robert* the father, and *Winifred* his wife, in 1698, had not barred or deſtroyed this contingent remainder, becauſe of the intermediate eſtate tail to *Robert* the ſon, which was ſufficient to preſerve it; and then the fine enured only as a * grant of what they might lawfully grant, and did not in any reſpect touch or affect this remainder. 345

1 Inſt. 23. a. 1 Vent. 372. Fearne's Cont. Rem. 30. 33.

On the other ſide, it was argued by Sir *Thomas Powis*, Serjeant *Pratt*, and Sir *Peter King*, as to the firſt point, that this was within the reaſon of the caſes of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, and that here was a reſulting uſe to him during his life, becauſe it might happen that all intermediate eſtates might determine before his death; for ſuppoſe the truſtees during his life, to ſupport the contingent remainders, ſhould forfeit their eſtate, and all the other eſtates determine, what then would become of the freehold during his life, for his heirs could not have it, and therefore he himſelf muſt have it, as part of the old uſe undiſpoſed of, which being conjoined with the laſt limitation to his right heirs, will make an entire fee in himſelf, and conſequently his right heirs cannot be purchaſers, no more than if he had made no limitation at all of the fee.

As to the ſecond point, it was argued, *1ſt*, That the laſt limitation in the deed of 1677, being to the truſtees and their heirs

heirs, in truſt for *Robert* and his heirs, was executed to him in poſſeſſion, as abſolutely as if it had been ſaid to the uſe of him and his heirs; for the ſtatute makes no difference between an uſe and a truſt, but mentions them both promiſcuouſly; and this, upon reading the deeds, ſeemed to be given up as a clear point.

2*dly*, Admitting it ſhould not be ſo, but that the legal eſtate continued in the truſtee, yet in a court of equity it muſt be looked upon as if he himſelf had been in actual poſſeſſion, and made ſuch ſettlement; for that a truſt in this court was guided by the ſame rules, and capable of the ſame limitations, as the poſſeſſion was at law, and no manner of difference betwixt them.

3*dly*, That till an appointment made, it was to the uſe of him and his heirs, and an appointment was * always wanting till it was made, and then he had good power to diſpoſe of and ſettle the remainder of thoſe lands to the uſes in the marriage ſettlement, becauſe there was no appointment thereof before, and conſequently nothing to hinder him from diſpoſing thereof as he thought fit. 346

4*thly*, Admitting this ſettlement of 1698 ſhould be conſtrued to be an appointment purſuant to his power, yet it was only a partial one, and made no diſpoſition of the whole uſe during his life; for if the truſtees to ſupport contingent remainders ſhould forfeit their eſtate, or have joined with thoſe in remainder in conveying their eſtate, and then all the intermediate eſtates had determined, here would have remained an undiſpoſed uſe during his life, for of that he has made no appointment, and then that being united with the laſt limitation to his right heirs, makes an entire fee in himſelf, and conſequently his heirs muſt have taken it by deſcent, and not by purchaſe, and then he had good power over it, and the diſpoſition by his will muſt ſtand.

As to the third point, it was argued, that this fine by the huſband and wife, in 1698, deſtroyed or gave away the remainder to the right heirs of the ſurvivor of them, becauſe they both joined in it; and in *Albany*'s caſe, 1 *Co.* 110, it is ſaid, that a feoff-

ment deſtroys all rights, all titles, all poſſibilities, both preſent and future; and if a feoffment has that force, much more has a fine, which is of ſo much a higher nature.

2*dly*, That this fine eſtops the heir to claim this eſtate againſt the fine of his anceſtor; he cannot ſay, *partes finis*, &c. but is thereby totally barred and eſtopped from claiming it.

3*dly*, That this was no contingent remainder, or if it was, yet *Robert* the huſband ſurviving, the contingency was then at an end, and his heirs muſt take it; but he having an eſtate for life therein, they could only take it by deſcent, for then the
347 whole fee was veſted * in him, and conſequently he had good power to ſubject it by his will to the payment of his debts and legacies.

My Lord Keeper, after all, ordered a caſe to be ſtated upon theſe ſeveral points out of the deeds, and then he would conſider of them, and give his opinion, and if it were neceſſary would deſire the aſſiſtance of ſome of the judges in it; but he inclined ſtrongly, that old *Robert* had power to ſubject all theſe lands by will, as his old reverſion undiſpoſed of, and at laſt ſaid, they might argue to the contrary from ſun riſing to ſun ſetting, they would not change his opinion.

*DE 348

Termino S. Mich.

1712.

In Curia Cancellariæ.

King *verſus* Withers. Caſe 257.

Antè, 109 and 227. and references. Gilb. Rep. 26. S. C. Chan. Caſes, 22. 58. 158. 2 Chan. 1. 23. 95. Vern. 20. 2 Vern. 293. 357. 452. 572. 720. Caſes temp. Talb. 117. 1 Eq. abr. 112, pl. 10. 2 Eq. abr. 656, pl. 10. S. C. 3 Wms. 414. S. C.

THIS cauſe came to be heard by conſent, and upon opening the caſe, appeared to be this: The defendant's father, by his will in writing, duly atteſted, deviſed to the defendant (who was his heir at law) and to his heirs, all his lands, tenements, and hereditaments, in the county of *Berks* (except ſuch and ſuch parts thereof) charged and chargeable with the ſum of 2500*l.* to his daughter (ſince married to the plaintiff) at her age of 21 years, or marriage, which ſhould firſt happen, and deviſed the excepted lands in truſt, to be ſold for the payment of his debts, provided, if his ſaid daughter ſhould marry in the life-time of her mother, without her conſent firſt had in writing, then 500*l.* part of the ſaid 2500*l.* ſhould ceaſe, and ſhould be applied towards payment of his debts charged on the ſaid excepted lands; and appoints his wife to be guardian of his daughter, and makes her executrix, and dies.

A. deviſes his real eſtate to his ſon, charged with his debts and legacies, and deviſes 2500*l.* to his daughter, at the age of 21, or marriage, provided, that if ſhe ſhould marry in the life-time of her mother, without her conſent in writing, then 500*l.* to ceaſe, and be applied towards payment of the debts. The daughter attains 21, and marries without her mother's conſent, the whole portion ſhall be raiſed, for it was veſted in her at the time of the marriage.

249 The daughter attains her age of 21 years, and afterwards, without the conſent or privity of her mother, * intermarries with the plaintiff, who was a gentleman of ſome eſtate, and called to the bar, but had made no ſettlement or proviſion for his wife; and therefore the defendant, the heir at law, refuſed to raiſe or pay any part of his ſiſter's portion, and inſiſted likewiſe, that by her marriage, without her mother's conſent, 500*l.* part of her portion, was become forfeited; whereupon the plaintiffs brought this bill to have the whole portion raiſed and paid by a ſale of the lands charged therewith.

For the plaintiffs it was inſiſted, that upon the daughter's attaining her age of 21 years, the whole portion became veſted in her, and that ſhe might then have demanded it; and though ſhe afterwards married without her mother's conſent, yet that could not diveſt or bring back the portion, which was before veſted and ſettled as an intereſt in her, for that conſent, in all reaſon, could be carried no farther than during her minority, or until ſhe attained the age of 21 years, during which time ſhe was appointed to be under the tuition and guardianſhip of her mother, and therefore ſo long it might be reaſonable to reſtrain her from marrying without her mother's conſent, but not after; and though the words are, if ſhe marries without her mother's conſent, during her life, yet that muſt be taken only, if her mother be living during the time ſuch conſent was requiſite, that is, during her minority, for which time ſhe was to be under her mother's guardianſhip; but upon her attaining her age of 21 years, the power of the mother as guardian ceaſed, and conſequently it was never intended to confine her beyond that time to her mother's conſent in marriage.

That here was no deviſe of the 500*l.* over, and therefore it muſt be taken to be only *in terrorem*, according to the reſolution in † *Fry and Porter*, 1 *Vent.* and conſequently the plaintiffs ought to have the whole portion raiſed by ſale of the lands charged therewith, unleſs the defendant ſhould otherwiſe provide for the payment thereof.

† 1 Eq. abr. 111, pl. 4. S. C.

On

* On the other ſide it was urged for the defendant, that *cujus eſt dare, ejus eſt diſponere*; that a man may impoſe what terms and conditions he thinks fit in the diſpoſal of his eſtate; that here he has expreſsly made the mother's conſent requiſite during her life; and to ſay, that the whole portion veſted in the daughter, upon her attaining her age of 21 years, is nothing to the purpoſe; for though it did, yet, without queſtion, the condition may bring it back again, as if a feoffment in fee be made upon condition, here the eſtate is veſted, yet the breach of the condition will fetch it back again out of the feoffee; and when the deviſor has, in expreſs words, reſtrained her from marrying, without her mother's conſent, during her life, you will not ſurely reject this condition, and give her the whole portion, without any regard to her obſerving the terms of it; beſides, here is a deviſe over, for, upon her marriage without her mother's conſent, the 500*l.* is to go towards payment of debts, in caſe of the other part of the teſtator's eſtate made liable thereto; and though there were no ſuch deviſe over, yet the 500 *l.* is forfeited by her violation of the condition annexed to it; and ſo it was held in the caſe of *Bennet* and Lord *Saliſbury*. 350

Lord Keeper. This portion did not veſt in the daughter preſently, for it is not given to her generally to be paid, or payable at ſuch a time, but it is given to her at her age of 21 years, or marriage, ſo that, before that time, no intereſt or right to it veſted in her; but here ſhe has attained the age of 21 years. This is not a perſonal legacy, but is to be raiſed out of lands, and therefore muſt have the ſame conſideration as a deviſe of the lands would have; and I think the rule, that where there is no deviſe over that the condition ſhall be taken only *in terrorem*, is a great deal too wide, for here in effect is no deviſe over, for though it be to go towards payment of debts, yet here appears to be no creditors concerned, none that are in danger of loſing their debts; and therefore I ſhall conſider it* as it ſtands, upon the condition itſelf; and I think in this caſe 351 the plaintiff muſt have her whole portion, for the teſtator has appointed two times, marriage, or 21 years, to entitle her to it, and whichſoever of them firſt happened gave her a right to

demand it; and here ſhe has attained her age of 21, and that ſingly gives her a title to it: indeed, if ſhe had married before that age, ſhe muſt have had her mother's conſent, otherwiſe ſhe was to loſe 500*l.* but when ſhe attains that age, and marries after, her title to the whole, which was compleat by her attaining that age, is not to be impeached after by her marriage without her mother's conſent; for, as her marriage with her mother's conſent was one title, ſo her attaining her age of 21 years was another, and whichſoever of them firſt happens entitles her to her whole portion, and ſhe having attained the age of 21 years firſt, her title to the portion reſts wholly upon that; and therefore there muſt be a decree for ſale of ſo much lands as will be neceſſary for that purpoſe, unleſs the defendant will otherwiſe ſecure the payment of it; but the money, when raiſed, muſt be brought before the Maſter, till the plaintiff ſhall have made ſome ſettlement upon his wife, for which purpoſe he is likewiſe to bring his title-deeds before the Maſter, to ſee what proviſion he can make for her.

Caſe 258.

Kitſon *verſus* Kitſon & al'.

Antè, 325. Poſt, 505. 2 Eq. abr. 275, c. 4. S. C.

The wife of a freeman of *London* ſhall not take by her huſband's will, and likewiſe by the cuſtom, unleſs it be ſo declared in the will.

Francis Kitſon, coachmaker, being a citizen and freeman of *London*, and ſeiſed of a good real eſtate, and alſo poſſeſſed of, and entitled to, a conſiderable perſonal eſtate, makes his will the 20th of *Sept.* 1711, and thereby deviſes to his wife *Anne Kitſon*, the plaintiff, for her life, all his lands, tenements, and eſtate whatſoever, at *Ingville-Green*, in the county of *Surrey*; and, after her death, he deviſes the ſame to his nephew *Edward Kitſon*, of *Henley*, and his heirs for ever; and after ſeveral legacies and bequeſts, he goes on, *Item*, As * to the houſe wherein I now dwell, together with all my ſtock of timber, and other ſtock, goods, chattels, debts, and perſonal eſtate, whatſoever and whereſoever, I give and deviſe to my ſaid wife *Anne Kitſon*, for her life, with power for her to diſpoſe of 500*l.* part thereof, at her death; and, after her death, I give and deviſe all my ſaid ſtock, goods, chattels, and perſonal eſtate, except the ſaid 500*l.*

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to

to and amongſt my ſiſter *Elizabeth Kitſon*, *Elizabeth Thorp*, and ſeveral others of the defendants: he likewiſe gives to his wife, for her life, all his five houſes in *Hedge-Lane*; and, after her death, he gives the ſame to his ſaid nephew *Edward Kitſon*, his executors and adminiſtrators; and makes his ſaid wife and Mr. *Robins* executors, and dies.

Mr. *Robins* alone proves the will, and the widow brought this bill againſt him, and alſo againſt the ſaid *Edward Kitſon*, *Elizabeth Kitſon*, and the reſt of the reſiduary legatees, and alſo againſt one *Edward Kitſon*, who was heir at law to the teſtator, to eſtabliſh the will, and to have the lands and eſtate of *Ingville-Green* quieted to her for life, and likewiſe the five houſes in *Hedge-Lane*, and likewiſe to have one moiety of the perſonal eſtate, and her widow's chamber, as her own for ever, by virtue of the cuſtom of *London*, as a freeman's widow, there being no children, and to have the other moiety of the perſonal eſtate for life, by virtue of the will, and the power of diſpoſing of 500 *l.* thereout at her death.

The defendant *Robins* anſwered, and ſubmitted to do as the court ſhould direct.

The other defendants likewiſe anſwered and inſiſted, that the plaintiff ought to make her election, to take either by the cuſtom of *London*, or by will, and not by both, and brought a croſs bill for that purpoſe, and to have an account; and as to *Edward Kitſon*, the bill was, that in caſe the widow ſhould elect to take by the cuſtom, that he might be let into the immediate poſſeſſion of the eſtate at *Ingville-Green*, and the five houſes * in *Hedge-Lane*; and that, as to the reſt, in caſe of ſuch election, they might have a moiety of the perſonal eſtate forthwith. 353

For the widow it was inſiſted, that as to the eſtate of inheritance at *Ingville-Green*, ſhe had brought the heir at law before the court to eſtabliſh the will againſt him, and alſo againſt the deviſee in remainder, and that there could be no colour to take away her eſtate for life in that part of the eſtate, being expreſsly and ſpecifically deviſed to her for life, and the deviſe thereof

thereof collateral and independent of the deviſe of the perſonal eſtate.

As to the perſonal eſtate, it was inſiſted, that the teſtator muſt be ſuppoſed to know that he was a freeman, and that as ſuch he had no power at all over a moiety thereof, but that by his death the ſame veſted in his widow, as her own for ever; and conſequently, when he deviſed all his perſonal eſtate, that could be intended no more than he had a power over, which was his own moiety; for as to the other moiety, it was none of his to diſpoſe of, nor could he by his will make better or worſe his wife's title thereto; therefore his deviſe of all his perſonal eſtate muſt be meant, all he had a power over, all he could give, not what the cuſtom of *London* had already given her; and conſequently ſhe muſt take her own moiety by the cuſtom, and the other by his will.

On the other ſide it was argued, that the plaintiff was very unreaſonable in her demands; that in this court, wherever a perſon had a debt owing to him, and the debtor by his will gave any thing which was equivalent to, or more than the debt, it had always been allowed to go in diſcharge and ſatisfaction of the debt, much more in this caſe of the cuſtomary part, which was in the nature of a debt or demand out of the teſtator's perſonal eſtate, and therefore, when he gives her all his perſonal eſtate for life, it muſt be ſuppoſed he intended it in ſatis-
354 faction of her moiety thereof due * by the cuſtom of *London*; that it is plain in this caſe that he intended her the power of diſpoſing of 500*l.* only of his perſonal eſtate, and no more, for he not only gives her no more to diſpoſe of at her death, but when he comes to diſpoſe of the reſidue, takes it up again, and ſays, all the reſt of my perſonal eſtate, except the ſaid 500*l.* I give and deviſe to the defendants; ſo that it is plain he intended ſhe ſhould have power to diminiſh or leſſen his perſonal eſtate no more than that 500*l.* only.

And though this deviſe could not debar or exclude her of her cuſtomary part, if ſhe thinks fit to elect it, yet ſhe ought not to take both; and of this there can be no doubt, ſince the caſe of

of † *Heron* and *Heron*, where Sir *Joſ. Heron* had cantoned out his real and perſonal eſtate amongſt his wife and children, and after his death my Lady *Heron* would have had, not only what was ſo given her by her huſband, but alſo her cuſtomary part as a freeman's widow; but was decreed by my Lord Chancellor *Cowper* to make her election, and that ſhe ought not to claim both; there was likewiſe a caſe cited between ‡ *Lawrence* and *Lawrence* to the ſame effect.

† 2 Vern. 355.

‡ 2 Vern. 365. 2 Wms. 617.

My Lord Keeper was clearly of this opinion, and pronounced his decree accordingly; but held, that as to the eſtate on *Ingville-Green*, that had no dependence upon or relation to the deviſe of the perſonal eſtate, but that, notwithſtanding ſhe made her election (as ſhe did in court, to take by the cuſtom) yet that the deviſe of that eſtate to her continued good for life; though it was urged by Mr. *Vernon* and *How*, that upon her electing to take by the cuſtom, ſhe ought to have no benefit at all of the will, but that *Edward Kitſon*, the deviſee in remainder, ought to be let into the poſſeſſion of that eſtate immediately.

But his Lordſhip held otherwiſe; and as to the five houſes in *Hedge-Lane*, they being leaſehold, were decreed to come in with the reſt of the perſonal eſtate, and to be ſold, and the money to be divided * accordingly: but as to them the court 355
ſeems not to have apprehended the caſe rightly; for they being expreſsly given the widow for life, and after her death to *Edward Kitſon*, together with the eſtate at *Ingville-Green*, they ought, as it ſeems, to have gone accordingly; for by the decree for ſale of them, the remainder to *Edward Kitſon* is deſtroyed, which ſurely the court never intended, whatever they thought fit to do as to the widow's eſtate for life therein; and if the eſtate for life to the widow of the lands of inheritance were good, it ſeems ſo muſt the deviſe of thoſe houſes too, being expreſsly deviſed to her before he came to the *reſiduum*, otherwiſe there is an injury done to *Edward Kitſon*'s remainder therein; but this was not taken notice of, or explained to the court.

There was another point in this caſe, which was this: *Francis Kitſon*, about three years ago, purchaſed the remainder of

of a term for 1000 years in an eſtate at *Egham*, of one *Booth*, which *Booth* had a decree of foreclosure againſt one *Jane Reading*, the heir at law, that upon payment of 20*l.* to be put out by the ſenior Maſter of the Court of Chancery, the ſaid *Jane Reading* ſhould, within ſix months after ſhe came of age, releaſe and convey the inheritance and equity of redemption to *Booth*, his heirs and aſſigns, unleſs cauſe within ſix months after ſhe came of age: this term was aſſigned to the defendant *Robins*, in truſt for Mr. *Kitſon*, to attend the inheritance when it ſhould be conveyed; but the 20*l.* was never paid, and no conveyance as yet made of the inheritance; and whether this ſhould be looked upon as real or perſonal eſtate, was ſubmitted to the court, and held, that by reaſon of the decree, and a covenant from *Booth* for that purpoſe, it muſt be deemed to be an eſtate of inheritance, and the widow muſt have it for life, and ſhe to pay one third part of the 20*l.* and *Edward Kitſon*, the deviſee in remainder, two thirds, with intereſt proportionably from the time it ought to have been paid, *Booth* being become inſolvent.

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* Afterwards, on a rehearing before Lord Chancellor *Parker*, the houſes in *Hedge-Lane* were decreed to *Edward Kitſon*, after the widow's death, and her repreſentatives to be recompenſed out of the perſonal eſtate of the reſiduary legatees; that is, as ſhe renounced the will, *Edward Kitſon* was let into the poſſeſſion of theſe five houſes immediately, and the widow was to have a moiety of the value thereof out of the moiety of the teſtator's other perſonal eſtate, which belonged to his reſiduary legatees, immediately, by the wife's removing the will and claiming by the cuſtom.

In Curia Cancellariæ.

*DE Termino Paſchæ, 1713.

In Curia Cancellariæ.

Greenhill *verſus* Waldoe. Caſe 259.

Antè, 337. Gilb. Eq. Rep. 31. S. C. 2 Eq. abr. 640, c. 6.—Vid. Poſt, 503.

By a marriage ſettlement, a term was limited to truſtees, for raiſing, on failure of iſſue male, 3000 *l.* for daughters portions, payable at 18, or marriage. The father and mother die, leaving iſſue two daughters only, who at the death of the father (who ſurvived the mother) were 15 or 16 years of age, and who had, by the father's will 500 *l.* apiece deviſed to them, payable at the ſame time with their original portions; but the eſtate was deviſed to *J. S.* One of the daughters being married, and being of the age of 20, held, on her bill, that ſhe muſt have maintenance from the time of her father's death, till the portion became due, and from thence intereſt at 5 *per cent.* till paid.

IN this caſe, upon a marriage ſettlement, after the common limitations to the firſt and other ſons, a term was limited to truſtees for 300 years, in truſt, upon failure of iſſue male, to raiſe, with all convenient ſpeed, out of the rents and profits, or by mortgage or ſale, 3000 *l.* for daughters portions, if more than one, to be equally divided between them; and if only one, ſhe to have the whole 3000 *l.* and to be paid to ſuch daughter or daughters at their reſpective ages of 18 years, or days of marriage, which ſhould firſt happen, after the death of the father or mother: they have iſſue two daughters only, and no ſon, and the father by his will, taking notice of this proviſion for his daughters, deviſes to them 500 *l.* apiece more, to be paid at the ſame time as their original portions were payable; but in caſe either of them died before the age of 18 years, then the additional portions of 500 *l.* apiece to both were to ceaſe. The father and mother * both die, the daughters being then about 15

† There being an error in the paging of the original edition of this work, by the omiſſion of ten pages in the numbers betwixt this and the foregoing page, it was found neceſſary to continue the ſame arrangement in the pages in this edition, in order to preſerve the application of the references that are made in other books to the ſubſequent part of this work.

or 16 years of age; the plaintiff intermarries with one of them, and ſhe being now about 20 years of age, this bill was brought againſt the defendant, brother and deviſee of the eſtate charged with theſe portions, and againſt the truſtee of the term, to have the portion raiſed, and intereſt from the death of the father.

It was inſiſted, that this was but reaſonable, in regard the father and mother dying before the portion became payable, there was no maintenance provided for them in the mean time, and it might have happened that the daughters might have been but two or three years of age at the death of their father and mother, and if this court in ſuch caſe would not help them to a maintenance till their portions became payable, they muſt ſtarve; that they were heirs at law, and diſinherited, and therefore, if by any conſtruction they can be helped, this court would do it; that here the portions are directed to be raiſed with all convenient ſpeed, and if they had been raiſed preſently after the father and mother's death, the brother and deviſee could not complain, for his eſtate was liable to the raiſing them preſently; then, when the portions are raiſed, who is to have the intereſt? for they have nothing to do with it in their own right, nor their brother and deviſee, for he has the eſtate, and no wrong is done to him; and therefore, ſurely, in ſuch caſe, the daughters themſelves would be entitled to it; ſo in this caſe, though they are now above 18 years of age, yet they ought to have intereſt from the time their portions became raiſable.

On the other ſide it was inſiſted, that here was no direction for intereſt or maintenance till their portions became payable; that this was the agreement of the parties at the time of the ſettlement, and could not be broke into; that if there had been no portions at all provided for them, they might have had reaſon to complain, but could not have been relieved; that in this
369 caſe their portions did not veſt till 18, or marriage, * there being a clauſe, that, if either died before that time, the ſurvivor was to have her ſhare, and if both died before that time, the whole portion was to ſink in the inheritance; that it being contingent

tingent whether both or either of the portions would become payable, neither could veſt till the contingency happened as to both; that theſe additional portions of 500*l.* apiece by his will were in lieu of maintenance, and the eſtate ought not to be further charged.

But my Lord Chancellor was of opinion, that they ought to have either intereſt or maintenance from their father's death (he being the ſurvivor) and thought it much the ſame, whether it were called intereſt or maintenance; that the father never intended they ſhould ſtarve till their portions became payable; and therefore ſent it to a Maſter to ſee what was reaſonable for their maintenance from the time of their father's death, and decreed the original portions to be raiſed by ſale, *&c.* with intereſt at 5*l. per cent.* from their reſpective ages of 18 years, unleſs the brother ſhould, by payment, prevent ſuch ſale, and would allow but 5*l. per cent.* being charged on land, though it was preſſed to have 6*l. per cent.*

* D E

Termino S. Trinitatis,

1713.

In Curia Cancellariæ.

Caſe 260.

Loeffes *verſus* Lewen & al'.

Gilb. Ch. 297. 1 Eq. abr. 56, pl. 8. Gilb. Eq. Rep. 32. 2 Eq. abr. 256, pl. 5. 1 Atk. 625.

Where a bond ſhall be deemed voluntary and fraudulent againſt creditors.

IN this caſe the queſtion was, Whether the plaintiffs, who were creditors of one *Eyton*, ſhould have the benefit of a bond for payment of 1500*l.* entered into by one *Bayly* to *Eyton*, or if the ſaid bond ſhould be looked upon to be voluntary and fraudulent, as againſt the creditors of *Bayly*, who were defendants; and they to be accordingly firſt ſatisfied out of *Bayly*'s aſſets, they being creditors only by ſimple contract; and as to that, the caſe appeared to be thus:

One *Maſon*, a vintner and freeman of *London*, made his will about 24 years ſince, and thereby deviſed one third part of his perſonal eſtate to *Letitia* his wife, and the other two thirds to his children, and died, leaving only two daughters, *Letitia* and another, who afterwards died inteſtate and unmarried. *Letitia* the widow afterwards intermarried with *Bayly*, who was a vintner likewiſe; and the widow, as well before marriage, as ſhe and her huſband after marriage, continued to employ the whole

whole ſtock left by *Maſon* in carrying on of their trade, without making any diſtribution or diviſion to the children.

* Some time after, upon a treaty of marriage to be had between *Letitia* the daughter and *Eyton* (the other daughter being then dead) a computation was made of what fortune would be coming to *Letitia* the daughter, and the ſame appearing to be ſhort of what *Eyton* expected, *Bayly* agreed to make up her fortune the ſum of 4000 *l.* but there was no writing or memorandum of it under hand; but *Bayly* did afterwards pay all but 1500 *l.* of the fortune agreed on. 371

About four years after the marriage, *Bayly* makes his will, and at the ſame time prepares a bond to *Eyton* of 3000 *l.* conditioned for the payment of 1500 *l.* to him, at ſuch a time; and then ſends for *Eyton* and his wife, ſhews them the bond and will, whereby he had likewiſe given them a legacy, but never delivers the bond to *Eyton*, or his wife, but kept it in his own cuſtody; and *Bayly*, ſome time after, dying ſuddenly, this bond was delivered over to one *Owen*, who was a defendant, to be kept by him, as an indifferent perſon, till it ſhould appear how things were like to go. *Bayly* dying conſiderably indebted, his executors renounced, and adminiſtration, with the will annexed, was granted to the defendant *Lewen*, as principal creditor for about 2000 *l.* by ſimple contract; and *Bayly* was likewiſe indebted to ſeveral others by ſimple contract: afterwards *Eyton* becomes a bankrupt, and this bond of 1500 *l.* was aſſigned by the commiſſioners to the plaintiffs, who were his creditors; ſo this bill was brought to have the bond delivered to the plaintiffs, and to have an account of *Bayly*'s perſonal eſtate, and ſatisfaction thereout for the ſaid 1000 *l.* Several proofs were read on the plaintiff's part, to prove the due execution of the bond; and that ſeemed to be out of all doubt: *Eyton* and his wife likewiſe being examined as witneſſes, by order of the court, did, both by their anſwer and depoſitions, ſwear the agreement by *Bayly* to be to pay or ſecure 4000 *l.* for the wife's portion.

* On the other ſide it was proved, that if this 1500 *l.* ſhould be taken out of *Bayly*'s aſſets, there would not be enough to 372

pay above 4*s.* 6*d.* in the pound to his creditors; ſo the only queſtion was, Who ſhould have the preference?

But another queſtion was made, Whether the dead daughter's portion ſhould ſurvive wholly to the other daughter, or be diſtributed between her and her mother, according to the ſtatute? And as to this a difference was taken and agreed by the court, that as to the orphanage part, which belonged to the daughters, by the cuſtom of *London*, the ſurvivor ſhould have the whole, even after a diviſion and partition made between them; but as to the teſtator's part, deviſed to them, that was under the direction of the ſtatute as a legacy, and muſt be diſtributed between the mother and ſurviving daughter accordingly.

And as to the other point, the court was of opinion, that this bond was to be looked upon as voluntary againſt the creditors of *Bayly*; but my Lord ſaid, that the agreement to pay or ſecure 4000*l.* in conſideration of the marriage, though it were only by parol, and by conſequence not binding within the Statute of Frauds and Perjuries, yet it was binding in conſcience; and therefore, ſo far as *Bayly* afterwards executed that contract, by payment of part of the money agreed upon, it was an effectual performance, and not to be ſet aſide in a court of equity, and he never would call that fraudulent which was juſt; but as to the 1500*l.* bond, you cannot tack that to the parol agreement, ſo as to make it any evidence in writing of that agreement, or as a performance of it, for that appears to have been given four years after, and without any application of *Eyton* or his wife; beſides, if it had been intended to be in execution of the former agreement, it is natural to conclude it would have been immediately delivered over to the obligee, or his wife, which here it was not, but *Bayly*, the obligor, always kept it by him; it was
373 made at * the ſame time with his will, ſhewn to them at the ſame time with his will, and, after his death, found with his will, and therefore he could take it no otherwiſe than in the nature of a legacy, and voluntary; and therefore decreed an account to be taken of *Bayly*'s perſonal eſtate, and that to be applied, in the firſt place, towards payment of his own creditors, and, if any

ſurplus

ſurplus remained, the plaintiffs were to come in for a ſatisfaction of their bond, in the next place, before the legatees of *Bayly*, and coſts on all ſides to come out of *Bayly*'s perſonal eſtate, he being the occaſion of this ſuit: but the plaintiffs thought there would be no ſurplus at all, and therefore deſired a farther day to conſider whether they would not chooſe to have their bill diſmiſſed, rather than enter into the account; and my Lord Chancellor gave them time accordingly to conſider of it.

*DE

Termino S. Mich.

1713.

In Curia Cancellariæ.

Symondſon *verſus* Tweed.

Caſe 261.

Antè, 208.

A court of equity will decree a ſpecific execution of a parol agreement, if it be ſet forth in the bill, and confeſſed by anſwer.

IN this caſe the court declared, and the counſel agreed likewiſe, that if a man brings a bill for a ſpecific performance of a parol agreement, ſetting forth the ſubſtance of it in his bill, and the defendant by his anſwer confeſſes the agreement, that the court may in ſuch caſe decree an execution thereof, notwithſtanding the Statute of Frauds and Perjuries, becauſe the defendant confeſſing the agreement, there can be no danger of perjury from contrariety of evidence, which was the only miſchief that ſtatute intended to obviate.

Poſt, 402. 526. 533.——Vid. 2 Strange, 783.

But in the principal caſe the defendant had not, by his anſwer, confeſſed the agreement charged in the bill, which was only by parol, to ſettle ſome lands and houſes on the plaintiff, in conſideration of his marrying the defendant's daughter, and therefore the bill was diſmiſſed; and it was ſaid, in all caſes where the court had decreed a ſpecific execution of a parol agreement, yet the ſame had been ſupported and made out by letters in writing, and the particular terms ſtipulated therein as a foundation for their decree, otherwiſe the court would never carry ſuch an agreement into execution.

* Brander *verſus* Boles.

Caſe 262.

THE plaintiff was aſſignee of a commiſſion of bankruptcy iſſued out againſt one *Boſvil*, who was a gunpowder-maker, and had contracted with the defendant for as much ſalt-petre as came to 244*l.* but not having ready money to pay for the ſame, propoſed to make him a mortgage of an eſtate he had in his own poſſeſſion, by way of ſecurity for the money, and in order thereunto left with the defendant the title-deeds, to get the aſſignment drawn; the defendant carried the deeds to an attorney, to look into the title, and draw the aſſignment, and the attorney kept them by him for ſome time, and then died, without having drawn the mortgage; after which, the defendant carried the deeds to a ſcrivener for the ſame purpoſe, but before the aſſignment was perfected the plaintiff became a bankrupt.

2 Eq. abr. 112, c. 1. S. C. Gilb. Eq. Rep. 35. S. C.

See Rep. temp. Finch 10. 11.

And now the plaintiff, aſſignee of the commiſſion, brought this bill to have the deeds delivered up, that ſo the eſtate might be ſold for ſatisfaction of the creditors.

The defendant inſiſted on the matters aforeſaid; and his counſel urged, that this was more than a pledge of the writing, that an aſſignment was intended to have been made; and if it had been made, this court would not have taken it from him without payment of the money; that its not being made was an accident, occaſioned by the death of the attorney, and this court often relieves accidents; and therefore the plaintiff ought not to have the deed without payment of the money.

Ruſſell v. Ruſſell in 1 Pro. Cha. Cas. 269.

But the court decreed the deeds to be brought before the Maſter, and to be delivered by ſchedule to the plaintiff; but, *Note*, No reaſon was given for this decree.

376
Caſe 263.

* Andrews *verſus* Cradock.

Gilb. Rep. 36. S. C. 1 Atkyns, 570.

Any perſon may, as *Prochein Amy*, exhibit a bill in the name of an infant, but cannot in the name of a feme covert without her conſent.

IN this caſe it was ſaid by counſel, and agreed to by the court, that any one may bring a bill as *Prochein Amy* to an infant, without his conſent, becauſe it is at his peril that brings it to be anſwerable for the event; but none can bring a bill in the name of a feme covert, as her *Prochein Amy*, without her conſent; and if ſuch bill be brought, upon her affidavit of the matter it will be diſmiſſed.

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*DE

Termino Paſchæ,

1714.

In Curia Cancellariæ.

East-India Company *verſus* Clavel & al'. Caſe 264.

Antè, 305.

A. agrees with the East-India company to go as preſident to *Bengal*, and enters into a bond of 2000*l.* penalty for performance of articles; but before he ſet out he made a ſettlement of his eſtate, and, among other things, he declared the truſt of a term of 1000 years to be for the raiſing of 5000*l.* as a portion for his daughter, who afterwards married *J. S.* a gentleman, of 700*l. per ann.* who, before the marriage, was adviſed by counſel that the portion was ſufficiently ſecured, and who afterwards, on her death, had, on her requeſt, expended 400*l.* on her funeral, but never made any ſettlement on her. After *A.* embezzles the goods and ſtock of the company to a conſiderable value, yet they cannot break through this proviſion, ſo as to make it voluntary and fraudulent as to them. *Fin 9. Ver. Jun. 194.*

SIR *Edward Littleton* being appointed by the East-India company to go as preſident to the bay of *Bengal*, and to tranſact and manage all the affairs of the company there, does, by articles dated 16th of *January*, 1698, for himſelf, his executors, and adminiſtrators, covenant and agree with the company, and their ſucceſſors, to depart with the firſt ſhip that ſhould ſet ſail for that place; and after his arrival there, he would faithfully, and to the utmoſt of his ſkill and power, tranſact and manage all things in relation to the company, for their benefit and advantage, and would not embezzle, miſemploy, or convert any of the goods or effects of the ſaid company to his own uſe, with ſeveral other covenants relating to his fidelity and good-behaviour in the ſaid employment; and at the ſame time Sir *Edward Littleton*, with Sir *Strenſham Maſters* and Mr. *Shepherd*, as his ſureties, became jointly and ſeparately bound in a bond of 2000*l.*

378 penalty, conditioned for * performance of the ſaid articles, and this bond, like all others, bound themſelves, their heirs, executors, and adminiſtrators.

Afterwards, Sir *Edward Littleton* being to proceed on his voyage, by leaſe and releaſe, the 21ſt of *January*, 1798, ſettles all his eſtate on truſtees, and their heirs, to ſeveral uſes, and among the reſt carves out a term of 1000 years, and this was declared to be upon truſt, that the truſtees ſhould raiſe the ſum of 5000*l.* as a portion for his daughter *Jane*, to be paid within three months after her marriage; and likewiſe a proviſion for the payment of his debts; and ſoon after ſets out for *Bengal.* During the time of his abode there he managed the affairs of the company, and had generally two or three hundred thouſand pounds of their money in his hands.

Mr. *Clavel*, the defendant, to whom Sir *Edward* had recommended the care of his daughter, ſome time after Sir *Edward*'s departure makes his application to her in way of marriage, and ſhe having the copy of her father's ſettlement in her hands, delivers it to Mr. *Clavel*, who went to counſel to adviſe upon it; and being adviſed, that the portion of 5000*l.* was ſufficiently ſecured by that ſettlement, Mr. *Clavel* and the young lady ſoon after married, but no ſettlement was made upon the marriage, though it was proved that Mr. *Clavel* had an eſtate of inheritance of about 700*l. per ann.* and a perſonal eſtate of conſiderable value. Some time after the marriage, Mrs. *Clavel* died without iſſue; and it being her deſire, ſhe was buried amongſt her own anceſtors at a great diſtance, which coſt Mr. *Clavel* about 400*l.*

After her death, Mr. *Clavel*, her huſband, took out adminiſtration to her, and brought his bill in this court againſt the truſtees, and had a decree for ſale of the 1000 years, and for raiſing and paying the 5000*l.* portion: ſeveral purchaſers bid for the eſtate before the Maſter, and the Eaſt-India company, from
379 time to time, * upon application to the court, obtained interlocutory orders to put off the ſale, upon pretence of bringing in better purchaſers; the reaſon of which was, that Sir *Edward Littleton*

Littleton had embezzled or miſemployed goods and effects of the company to the amount of 26000*l.* and ſo had forfeited his articles and bond, and made himſelf liable to ſatisfy the company that demand; and the company had before that time, by their agents and factors in *Bengal*, ſeized all the books, papers, and effects of Sir *Edward*, and taken him into cuſtody, where he died; and therefore the company conceiving themſelves intereſted in this eſtate, obtained the orders before mentioned for putting off the ſale; and now at laſt brought this bill againſt Mr. *Clavel*, the truſtees, and ſeveral others, to have an account of the real and perſonal eſtate of Sir *Edward*, and that the ſame may, in the firſt place, be ſubjected to the making good of their demands.

For the company it was inſiſted, that this ſettlement for raiſing 5000*l.* for the daughter was merely voluntary and fraudulent; that although all voluntary ſettlements were not fraudulent, yet this was apparently ſo, being made ſo immediately after the articles and bond given to the company; that it muſt be intended this ſettlement was made and prepared at the ſame time, though made to bear date five or ſix days after; that it was to take away or load that which was to be the fund for making good any embezzlements or miſapplications of the company's money or effects; that the company were real creditors for a very great ſum of money, and prior in time to the ſettlement for the daughter; that the ſettlement was purely voluntary; and beſides, the daughter was ſince dead without iſſue, and no ſettlement had been made upon her; and therefore it was hoped this voluntary ſubſequent ſettlement, made in fraud of the prior agreement and articles with the company, ſhould not prevail.

On the other ſide it was urged, that the articles bound only the executors and adminiſtrators of Sir * *Edward Littleton*; that 380
his heirs were not named in it, and conſequently his real eſtate not affected by thoſe articles; that indeed the bond had expreſsly charged his heirs as well as his executors and adminiſtrators, but then that could bring a *lien* upon the real eſtate no further than the penalty of the bond went, which was but for 2000*l.*; that

that there was no pretence in the world to call this ſettlement fraudulent, for though it was voluntary, yet it was made upon very juſt and good reaſon; that Sir *Edward* was going a very long and dangerous voyage, and in all probability would never return again; that having only one daughter, it was fit he ſhould ſet his houſe in order, and make ſome proviſion for her before he went; that it appeared not to be fradulent, in regard he expreſsly provided for the payment of his debts; that this to the Eaſt-India company was at that time no debt at all, nor is any preſumption to be allowed that he would become ſo indebted, in order to defeat this ſettlement; that admitting the ſettlement was voluntary at firſt, yet by an act *ex poſt facto*, ſuch voluntary ſettlement may become good, and ſo it was in this caſe; that Mr. *Clavel* was drawn in and invited by this ſettlement to marry the young lady; that he adviſed with counſel before-hand upon it, and was told it was an effectual proviſion for 5000*l.* portion; that in † Dr. *Hart*'s caſe in this court, and affirmed in the Houſe of Peers, *a letter from the father*, promiſing to give his daughter 1500*l.* portion, was held to be ſufficient, not only to exempt it out of the Statute of Frauds and Perjuries, but was held likewiſe obligatory upon the father to perform it, becauſe the perſon was thereby drawn in and invited to marry the daughter; that in our caſe Mr. *Clavel*, though he had made no ſettlement, yet had a very good eſtate, of which ſhe would have been dowable if ſhe had lived, and he has expended 400*l.* on her funeral to comply with her requeſt; that if this ſettlement were voluntary in its creation, ‡ *yet being the motive and inducement to Mr. Clavel to marry her*, * this had now made it valuable; and therefore it was prayed they might have the benefit of their decree, and the ſale go on to the beſt bidder.

† 1 Vern. 110, S. C. Eq. abr. 20, pl. 8. 2 Ventris, 361. 2 Vernon, 322. 2 Vernon, 200. 202. 2 Wms. 65. 5 Vin. abr. 522, pl. 34. 2 Eq. abr. 47, c. 41. 1 Strange, 236. Poſt, 526.

‡ Poſt, 402.

Lord Chancellor. I think the ſettlement was a very reaſonable, prudent, and honeſt proviſion, and no colour of fraud in it; the articles do not bind the real eſtate at all, but the bond only, ſo far as the penalty goes, which is but 2000*l.*; therefore let an account be taken of the perſonal eſtate of Sir *Edward Littleton*, and

and what of his goods and effects came to the company upon their ſeizure, and if that falls ſhort of the 2000*l.* the deficiency muſt be made good, in the firſt place, out of the ſale of thoſe lands, prior to the defendant *Clavel*'s demands; and till that account taken, let 2000*l.* of the purchaſe-money be brought before the Maſter, and placed out at intereſt, to abide the event of that account, and the reſidue be applied towards Mr. *Clavel*'s demand of 5000*l.* and all the parties muſt join in the ſale, and reſerve the conſideration of coſts till the account taken.

Boutell *verſus* Mohun, Tilden, & al'. Caſe 265.

Vid. 2 Wms. 472. 2 Eq. abr. 495, c. 11. Poſt, 440. 2 Vern. 57. 723.

What ſhall be a neceſſary implication to diſinherit an heir at law.

THE plaintiff's bill was to have an account of the perſonal eſtate of *Anne Mohun*, the defendant's teſtatrix, and a ſatisfaction thereout of the ſum of 400*l.* and likewiſe to have an account of the rents and profits of the eſtate in queſtion, from the death of the ſaid *Anne Mohun*; and upon the defendant's anſwers and proofs read in the cauſe, the caſe appeared to be in ſubſtance this:

Anne Birch, the plaintiff's grandmother, and mother of the ſaid *Anne Mohun*, being ſeiſed in fee of the eſtate in queſtion, and poſſeſſed likewiſe of a perſonal eſtate, to the value of about 2000*l.* died inteſtate ſeveral years ſince; after whoſe death the real eſtate came likewiſe equally between them, as next of kin: the plaintiff ſome time after being ſickly and infirm, and intending to go to *Montpellier* * for the recovery of her health, releaſes and 382
conveys her moiety of the eſtate in queſtion to her aunt, and her heirs, in conſideration of 400*l.* ſecured to her by her aunt's bond; but having a great confidence in her aunt, ſhe leaves this bond with her aunt, and then goes to *France*.

Afterwards *Anne Mohun*, the aunt, by indentures of leaſe and releaſe, the 25th and 26th of *March*, 1700, conveys the eſtate in queſtion to one *Pepper*, and his heirs, to the uſe of him, his executors, and adminiſtrators, for 99 years, if the ſaid *Anne Mohun*,

Mohun, and the plaintiff *Boutell*, her niece, or either of them, ſhould ſo long live; remainder to the uſe of herſelf and her heirs; and then declares the truſt of the term to be, that ſhe the ſaid *Anne Mohun* ſhould receive the rents and profits thereof for ſo many years of the term as ſhe ſhould live; then comes a proviſo, that if the ſaid *Anne Mohun*, her executors or adminiſtrators, ſhould pay the plaintiff the ſum of 400*l.* then the ſaid term was to ceaſe and be void; and the ſame 26th day of *March*, 1700, the ſaid *Anne Mohun* made her will, and thereby deviſes to the plaintiff the ſum of 400*l.* being the ſame ſum of 400*l.* ſecured to her by bond, and likewiſe by indenture of releaſe, bearing even date herewith, as the will expreſsly deſcribed it to be; then after, by another clauſe in the will, ſhe deviſes the eſtate in queſtion to the defendant *Henry Mohun* (who was her eldeſt ſon and heir) and the heirs of his body, after the death of the ſaid *Elizabeth Boutell* (the plaintiff) with remainders over, and dies.

The defendant *Henry Boutell* enters, and ſuffers a common recovery of the eſtate, and limits the uſes to himſelf and his heirs; and now the plaintiff brought her bill to have ſatisfaction of the 400*l.* and intereſt, and alſo an account of the rents and profits of the ſaid real eſtate from the death of her aunt; and *Henry Boutell* brought likewiſe a croſs bill to be let into a
383 redemption of the term, upon payment of the 400*l.* * and intereſt; and the ſingle queſtion was, Whether the plaintiff was to have this eſtate for life, by virtue of the deviſe to her for life by implication, or whether that clauſe meant no more than only to continue it a ſecurity to her for the 400*l.* and intereſt? The plaintiff read one witneſs to prove that her aunt declared ſhe ſhould have that eſtate for her life.

It was argued for her, that this deviſe gave her an eſtate for life by implication, and the implication here was neceſſary, being deviſed to the defendant, who was her ſon and heir, but that not to take place till after the plaintiff's death, and conſequently the plaintiff muſt have it during life, becauſe no one elſe could; that the 99 years term was no ſecurity of the 400*l.*

for

for that was determinable upon the death of the aunt and niece, and if the plaintiff, the niece, had died before the aunt, ſhe had no manner of benefit of that term; that though the proviſo made it in the nature of a mortgage, and redeemable upon payment of the 400*l.* and intereſt, yet that was no abſolute compleat ſecurity for the money; that this deviſe to her for life could not be taken to be of the ſame nature with the term, or as a further ſecurity for the money, becauſe ſhe had, in the firſt part of her will, expreſsly deviſed the 400*l.* to the plaintiff, and ſo had in a manner paid or exonerated her real eſtate of that; and though ſhe took notice, that it was the ſame 400*l.* ſecured to her by bond, and likewiſe by the 99 years term, yet that was only to prevent her claiming two ſeveral ſums of 400*l.* and therefore the deviſe after of her real eſtate was abſolute and independent, and muſt give her an eſtate for life by neceſſary implication.

On the other ſide it was argued, that this deviſe to her by implication could be intended only to be of the ſame nature with the term, or as a kind of further ſecurity to her for the money ſecured thereby; that as the term was redeemable on payment of 400*l.* and intereſt, ſo this eſtate by implication muſt be of the ſame * nature too; that as ſhe had the term for her life, it was but natural, when ſhe came to diſpoſe of the inheritance to her ſon, to give it him after the plaintiff's death, and proves only that ſhe carried the ſame intention throughout her will, that the plaintiff ſhould be ſecure of her 400*l.* and the eſtate not to be taken from her till that was paid; that this will was made the ſame day with the deed, and expreſsly referred to the 400*l.* ſecured by that deed; and therefore her giving the eſtate to her ſon after the plaintiff's death, could only be intended in purſuance and confirmation of that eſtate the plaintiff had before, which would have continued during her life, and ſhews only that ſhe would not ſeem to do any thing in derogation or prejudice of that eſtate. 384

And Mr. *Gilbert* argued, that even at law the books are, that the implication in a deviſe to diſinherit the heir, muſt be a neceſſary

ceſſary implication; that if the deviſe had been to the plaintiff after the death of a ſtranger, this would not have carried it to the plaintiff for life, becauſe no neceſſary implication but that it might deſcend to the heir at law in the mean time; that upon the circumſtances of this caſe, it might be reaſonably intended no other eſtate than what ſhe had before by the term; that as that was for life, it was natural and reaſonable not to give away the eſtate till after her death; that as the term was redeemable, ſo muſt this eſtate too, becauſe it might be intended no other, and therefore no ſuch neceſſary implication of an abſolute eſtate for life, as is allowed of in the books of law, to the diſheriſon of the heir.

My Lord Chancellor was of the ſame opinion, and eſpecially for this laſt reaſon, that here was no neceſſary implication; and therefore decreed the plaintiff her 400*l.* and intereſt, and diſmiſſed her bill as to the account of the rents and profits, but without coſts, for the colour ſhe had to make ſuch demand.

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Caſe 266.

* Andrews *verſus* Brown & Ux'.

Vid. Infrà. What will revive a debt, and bring it out of the Statute of Limitations.

ONE *Valentine Duncombe*, brother of the late Sir *Charles Duncombe* (to whom the defendant's wife was executrix) gave a promiſſory note in 1688, payable to one, or bearer, and the note had been handed from one to another, till at laſt *Valentine* became a bankrupt, and went into *France*, and long after ſix years, and the death of *Valentine*, Sir *Charles*, his executor, recovering a debt of 5 or 6000*l.* which was due to his brother, put out an advertiſement in the *Gazette*, for all perſons who had any debts owing from his brother to come to him, and make them out, and they ſhould be paid; and the plaintiff having this note, had proſecuted for the recovery of the money after the advertiſement, but could never bring it to a hearing till now, and now he had a decree for 300*l.* which was the money due by the note, and intereſt allowed from the time of the bill brought; though my Lord ſaid, this was in nature of an *Indebit. Aſſump.* at law.

And

And in this caſe it was held clearly, that if a man has a debt due to him by note, or a book debt, and has made no demand of it for ſix years, ſo that he is barred by the Statute of Limitations, yet if the debtor, after the ſix years, puts out an adverti ſement in the *Gazette*, or any other news-paper, that all perſons who have any debts owing to them from him will apply to ſuch a place, that they ſhall be paid; this (though it were general, and therefore might be intended of legal ſubſiſting debts only) yet amounts to ſuch an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the ſtatute again.

A debtor who publiſhes an advertiſement in a news-paper, that all debts due from him ſhould be paid, by this a debt barred by the Statute of Limitations ſhall be paid.

Salk. 154. 2 Vern. 141. 2 Wms. 145. 373. 3 Wms. 84. 89 (n.) 3 Atk. 107. Cowper, 548. 3 Brown's Parl. Caſes, 305. S. C. as in 2 Wms. 373. decree reverſed.

So if in that caſe the debtor had made his will, and directed that all his debts ſhould be paid, or made any proviſion for the payment of his debts in general; this likewiſe would revive ſuch a debt, and bring it out of the * ſtatute, ſo that his executors would be liable to the payment of that debt amongſt the reſt.

One who by will directs that his debts ſhall be paid, who makes proviſion for the payment of them, thereby revives a debt barred by the Statute of Limitations, and makes his executors liable.

Salk. 28. Carth. 470. 5 Mod. 425. 2 Vent. 151. 3 Atk. 107.

So if, after the ſix years, the debtor, upon application for that particular debt, acknowledges *and promiſes payment* (for a bare acknowledgment has been ruled not ſufficient) this revives the debt, and brings it out of the ſtatute; becauſe, as the note itſelf was at firſt but an evidence of the debt, ſo that being barred, this acknowledgment and promiſe is a new evidence of the debt, and being proved, will maintain an Aſſumpſit for recovery of it; and it was agreed, that a little matter would bring a debt out of the ſtatute, being to reſtore a right.

A promiſe to pay a debt, which is barred by the Statute of Limitations, ſufficient to maintain an Aſſumpſit, † *but a bare acknowledgment of it not.*

† Sed vid. Carth. 470. 2 Burr. 1099. Cowper, 548.

Another point in this caſe was, that after the bill and anſwer came in, and replication filed, ſeveral witneſſes were examined, and their depoſitions taken; then the plaintiff moved to withdraw his replication, and took exceptions to the anſwer, and got a ſecond anſwer, and then replied, and examined other witneſſes, and now, on the hearing, would read other depoſitions; but the other ſide inſiſting they could not be read, by reaſon the replication

plication was withdrawn, and ſo taken without any replication, they were irregular, and ought to be ſuppreſſed; and accordingly my Lord ordered they ſhould be ſuppreſſed; for that it was ſaid, they ſhould have examined them anew after the ſecond anſwer came in, and replication filed, or have moved the court to have had liberty to make uſe of them at the hearing.

Eq. abr. 233. S. C. Gilb. Rep. 42. S. C. and P.—Vid. Brown, 388.

A third point in this caſe was, wherein the court and bar both agreed, that where interrogatories are exhibited in the Examiner's office, and witneſſes examined thereon, that either party may, without application to the court, or order for that purpoſe, exhibit one or more interrogatories, or a new ſet of interrogatories, for further examination of the ſame or other witneſſes; but where a commiſſion is taken out for examination of witneſſes, there no new interrogatory, or ſet of interrogatories, can be exhibited, without * motion and order of the court; and the reaſon of the difference was ſaid to be, becauſe the Examiner is an officer of credit, and ſworn, and therefore preſumed to be impartial, and that he will not diſcloſe the depoſitions to either party; but the commiſſioners are private perſons, not ſworn, and are called plaintiffs commiſſioners, or defendants commiſſioners, and therefore, without leave of the court, no new interrogatories can be added before them.

Caſe 267.

Hunt *verſus* Hunt & Ux', & al'.

Where a ſettlement is made void by non-performance of a condition, yet a reconveyance held neceſſary.

THE defendant was ſon and heir apparent to the plaintiff, who had an eſtate of about 200*l. per ann.* and the defendant being about to marry *Elizabeth Wright*, who was not above 16 years of age, the plaintiff, by leaſe and releaſe, the 14th and 15th of *October*, 1708, ſettles and conveys his eſtate to truſtees, and their heirs; and, as to one part, to the uſe of himſelf for life; remainder, as to that part, after his death, and as to the other part in poſſeſſion, to the uſe of the defendant, for his life; remainder to the intended wife, for her life, for her jointure; remainder to the firſt and other ſons, *&c.* in the uſual form:

form: and in the releaſe was a proviſo, that if the marriage did not take effect, or if it took effect, and *Elizabeth* ſhould not, when ſhe came of age, by fine, or otherwiſe, join in charging an eſtate ſhe was then entitled to, of about 250 *l. per ann.* with the ſum of 2000 *l.* to be paid to the plaintiff, then the ſaid indentures of leaſe and releaſe and ſettlement were to be abſolutely void, to all intents and purpoſes.

The marriage took effect, and about half a year ago the wife attained her age of 21 years; but finding her own eſtate of more value than that ſettled upon her in jointure, ſhe and her huſband refuſed to join in charging it with the 2000 *l.* whereupon this bill was brought againſt them, and the truſtees, to have a reconveyance.

* It was inſiſted for the defendants, that here needed none, becauſe by the proviſo, on the defendant's refuſal, the eſtate limited to them was to ceaſe and be void; but the court thought that not ſufficient without a reconveyance, being in caſe of a freehold. 388

Then it was inſiſted for the plaintiff, and the bill was for that purpoſe likewiſe, that he might have an account and ſatisfaction of the meſne profits, received by the defendants from the time of the ſettlement; and it was ſaid, that by the proviſo the eſtate being to ceaſe and be void on the defendant's refuſal, the plaintiff ought to be reſtored to all benefits and advantages which he had parted with, as if no ſettlement had been made, and conſequently to the rents and profits received by the defendants: but my Lord Chancellor decreed a reconveyance, and an account of the rents and profits only from the defendant's refuſal after his wife came of age, and no coſts on either ſide; for it was ſaid, this was not a condition precedent, but ſubſequent to the veſting of the eſtate in the defendants. 2 Eq. abr. 208, c. 1. S. C. and P. Gilb. Eq. Rep. 43. S. C. and P.

* DE

Termino S. Trinitatis,

1714.

In Curia Cancellariæ.

Caſe 268.

Jennor *verſus* Harper.

1 Wms. 247. S. C.

A parol deviſe of 20 *l. per ann.* out of lands, to a charity, though before the Statute of Frauds not good as an appointment, by the 43 *Eliz.*

ONE *Jennor* made his will in writing ſome time in the year 1651, and afterwards, the 5th of *December*, in the ſame year, added a codicil in writing, and the ſame day another nuncupative codicil (upon which the preſent queſtion aroſe) and thereby deviſes, out of his lands and eſtate in ſuch a place, 20 *l. per ann.* for the erection of a ſchool, and maintenance of the ſchoolmaſter, for ever; this nuncupative ſchedule was after his death put into writing, and proved as ſuch by three witneſſes: the ſchool was built, and a ſchoolmaſter put in, and continued for ſeveral years by the executors of *Jennor*'s will; but afterwards the heir at law refuſing to continue the payment, no ſchool had been there kept for now about 30 years paſt. Some time ſince a commiſſion of charitable uſes was taken out, and the commiſſioners decreed the deviſe good, and the heir at law to pay 20 *l. per ann.* according to the nuncupative ſchedule; and now, upon exceptions to that decree, the queſtion was, Whether this were a good deviſe?

It

* It was urged for the charity, that this, though it were only 390
a parol deviſe, was a good appointment within the 43 *Eliz.* and that that act made no difference between an appointment by parol, and an appointment by writing; and that this being made before the Statute of Frauds and Perjuries, though it were only by parol, and ſo not good within 32 *H.* 8. was yet a good appointment within the 43 *Eliz.* which being ſubſequent in time, had repealed the former ſtatute as to this; and that a deviſe by tenant in tail to a charity, though not good againſt the iſſue upon the ſtatute *de Donis*, yet has been ſeveral times held good againſt him as an appointment by the 23 *Eliz.* which had abrogated that act as to ſuch charitable deviſes.

But on the other ſide it was urged, that theſe deviſes to charities, as well as other deviſes, muſt be governed by ſome rules; that by the civil law, if a man deviſed a charity out of his perſonal eſtate, and legacies thereout likewiſe to others, and the perſonal eſtate fell ſhort to anſwer all, the charity ſhould be preferred; but in this court that rule will not hold, but the charity muſt abate in proportion to the reſt; that ſince the Statute of Frauds, if a man by his will gave lands to a charity, yet if that will was carried but imperfectly into execution, and ſo was not good as a will, it has been held not to be good as an appointment; ſo was Dr. *Johnſon*'s caſe, where there were Antè, 270.
but two witneſſes to the will. Indeed, if a man ſhuold make a writing on purpoſe to found a charity, it might have another conſtruction; but when he makes a will, and intends it to other purpoſes, though he does thereby appoint a charity, yet if the will be defective as a will, it ſhall not operate as an appointment to ſupport a charity: that it was a long time doubted, whether a will in writing, though good in all circumſtances, ſhould operate as an appointment againſt the iſſue in tail; and if that was ſo much doubted, to ſupport a nuncupative deviſe out of lands to a charity would be carrying it ſtill much farther: and * Mr. 391
Williams mentioned a caſe in *Swinb.* 28, where a man ſent for a ſcrivener to make his will, and directed him to give his land to ſuch a one, and his heirs, upon condition; the ſcrivener wrote the deviſe, but before he had wrote the condition, the

teſtator died, and this was adjudged a void will; for an abſolute deviſe it could not be, becauſe the teſtator did not intend it ſo; and a conditional deviſe it could not be, becauſe the condition was added after the man's death: that the reaſon a deviſe by tenant in tail to a charitable uſe ſhall be good againſt the iſſue, is, becauſe the teſtator had it in his power by fine to have barred the iſſue, and though he did not live to perform that ceremony, yet as a will being perfect and compleat by the aid of the 43 *Eliz.* it might work as an appointment; for that at common law there were no fines, nor recoveries, nor eſtates tail, and therefore that ſtatute was a reſtoring of the common law; ſo a deed of bargain and ſale to charitable uſes, though not good by 27 *H.* 8. for want of enrolment, yet by the other act it will be good as an appointment, for that reſtores the common law; but no reſolution has ever gone ſo far as to ſupport a parol deviſe to a charity out of lands, becauſe being defective as a will, which was the manner of conveyance he intended to paſs it by, it can have no effect as an appointment, which he did not intend. And of this opinion my Lord Chancellor ſeemed to be, but took time to conſider of it, and afterwards decreed that it was not good as an appointment.

*DE

Termino S. Mich.

1714.

In Curia Cancellariæ.

Sayer *verſus* Sayer. Caſe 269.

2. Bro. 100.

1 Eq. abr. 200, pl. 9. 298, pl. 1. 2 Vernon, 688. S. C. Gilb. Ch. 328. Gilb. Eq. Rep. 87. 2 Eq. abr. 553, pl. 6. † 1 Vezey, 424. † 2 Vezey, 562. 623. † Caſes temp. Talb. 152. † 1 Atk. 414. 508.

† Theſe are authorities reſpecting bequeſts of *ſtock* in the funds, how far ſpecific or otherwiſe.

A Man by his will gives all his perſonal eſtate in *Wanſtead*, except his bed and bedding, to *J. S.* and after deviſes 300*l.* out of the perſonal eſtate, and his houſes in *Cannon-ſtreet*, to the plaintiff, who now brings this bill for a diſcovery of aſſets, and to charge the whole perſonal eſtate with the payment of his legacy; and it was proved in the cauſe, that the teſtator, at his death, was poſſeſſed of a coach and horſes at *Wanſtead*, and that there were likewiſe ſome arrears of rent due to him at his death out of lands in *Wanſtead*; it appeared likewiſe, that the teſtator had a perſonal eſtate beſides that at *Wanſtead*, to the value of about 300*l.* and beſides the houſes in *Cannon-ſtreet*.

A deviſe of all a man's perſonal eſtate at ſuch a place, a ſpecific deviſe thereof, and not to be brought in to make up other pecuniary legacies.

The firſt queſtion was, Whether the deviſe of his perſonal eſtate in *Wanſtead* was not ſuch a ſpecific deviſe thereof, as to exempt it from coming in aid of the other perſonal eſtate towards payment of this legacy?

† 1 Wms. 424. 574. 597.

393 † * Another queſtion was, Whether the coach and horſes, and the arrears of rent at *Wanſtead*, paſſed likewiſe as part of the ſpecific legacy?

My Lord Chancellor decreed, that the perſonal eſtate at *Wanſtead* was not to be applied towards payment of the 300*l.* legacy; firſt, becauſe it appeared that the teſtator had a perſonal eſtate, over and above that at *Wanſtead*, to the value of about 300*l.* *and his intent ſeems plain to charge that only with the legacy*, not having deviſed it out of all his perſonal eſtate whatſoever, or whereſoever, or inſerted any words to ſhew that his whole perſonal eſtate ſhould ſtand charged with it.

2*dly*, Becauſe having ſuch other perſonal eſtate to the value of about 300*l.* which he might preſume ſufficient to anſwer that legacy, yet as a ſupplement, and to aid the deficiency of it, in caſe that ſhould fall ſhort, he has likewiſe charged his eſtate in *Cannon-ſtreet* with it; which ſhews that he intended to provide for it out of ſome other fund, and not out of his perſonal eſtate in *Wanſtead*, which he had before ſpecifically given to another: but the caſe may ſo happen, that a ſpecific legacy ſhall be chargeable with the payment of a pecuniary legacy; as in this caſe, after he had deviſed his perſonal eſtate at *Wanſtead*, if he had likewiſe deviſed his perſonal eſtate at ſuch another place, and then deviſed ſuch 300*l.* legacy out of his perſonal eſtate, and died, leaving no other perſonal eſtate than in the two places before mentioned, this 300*l.* legacy muſt have come out of his perſonal eſtate at large in both places, though otherwiſe pecuniary legatees are generally to abate in proportion, where the perſonal eſtate not ſpecifically deviſed falls ſhort to anſwer their legacies, and ſhall have no aid of the ſpecific legatees to make up their pecuniary legacies; eſpecially, if they are deviſed generally, and at large, without ſaying, out of his perſonal eſtate, or

394 out of all his perſonal eſtate * whatſoever, or words to that effect: and it was agreed clearly, that this deviſe of his perſonal eſtate at *Wanſtead* was as much a ſpecific legacy of it, as if he had enumerated the ſeveral particulars of it.

It

It was likewiſe decreed, that the coach and horſes were part of his perſonal eſtate at *Wanſtead*, where he lived; for ſince there is no other period for fixing the time when a deviſe ſhall take place, but the inſtant of the teſtator's death, and you cannot ſay, that what he had a week, or a fortnight, or any other time before his death, ſhall paſs, rather than what he had at any other time, therefore, in caſe of a perſonal eſtate, which is fluctuating and changing, the inſtant of his death is the only time to aſcertain it, and we have no other rules in equity for the conſtruction of wills than what are at common law; and here at his death the coach and horſes were at *Wanſtead*; ſo for the arrears of rent, they are part of his perſonal eſtate at *Wanſtead*, for they were iſſuing out of lands there, and were there and no where elſe: and for the objection that the deviſe of his perſonal eſtate at *Wanſtead* ſhould carry only his houſehold goods, becauſe he thereout excepted his bed and bedding, which, as urged, was an argument of his intent to paſs only things of the ſame nature of thoſe he had excepted, this was looked upon as an objection of no weight at the bar, and the court took no manner of notice of it.

Sir John Talbott, alias Ivory, *verſus* Duke of Shrewſbury & al'. Caſe 270.

Antè, 236. and references. Gilb. Chan. 324. 2 Eq. abr. 352, pl. 10. S. C. Gilb. Eq. Rep. 89. S. C. 1 Salk. 155. 2 Salk. 508. 1 Wms. 408. 2 Wms. 553. † 3 Wms. 227. 2 Vezey, 635. ‡ 2 Atk. 300.

IN this caſe it was ſaid by Mr. *Vernon*, and agreed to by the Maſter of the Rolls, that if one, being indebted to another in a ſum of money, does by his will give him as great, A debtor, *without taking notice of the debt, deviſes a ſum as great, or greater than the debt to his creditor, this ſhall be a ſatisfaction; ſecùs, if it were deviſed on a contingency, or it were leſs than the debt.*

or

† In this authority the above poſition ſeems to have been over-ruled by Sir *J. Jekyll*, who obſerves, that if the teſtator meant the legacy ſhould be taken as a ſatisfaction, *he would certainly have taken notice of it.*

‡ In the caſe of *Nicholls* v. *Judſon*, 2 Atk. 301. it is obſerved by the Maſter of the Rolls, that though the general rule is, that a legacy which is greater, or as great as the debt, ſhall be taken to be a ſatisfaction, and too well eſtabliſhed to be miſtaken; yet in late caſes, where there are particular circumſtances, or a preſumption

395. or greater ſum of money than the * debt amounts to, without taking any notice at all of the debt, that this ſhall nevertheleſs be in ſatisfaction of the debt, ſo as that he ſhall not have both the debt and legacy; but if ſuch a debt were given upon a contingency, which if it ſhould not happen, the legacy would not take place, in that caſe, though the contingency does actually happen, and the legacy thereby became due, yet it ſhall not go in ſatisfaction of the debt, † *becauſe a debt, which is certain, ſhall not be merged or loſt by an uncertain and contingent recompence*; for whatever is to be a ſatisfaction of a debt, ought to be ſo in its creation, and at the very time it is given, which ſuch contingent proviſion is not; and cited the caſe of one *Pollexfen* to be ſo adjudged by the Lord *Harcourt*, and affirmed on an appeal in the Houſe of Lords: and as it is in the caſe of a will, ſo it will be likewiſe if the proviſion were by a deed; if the proviſion be abſolute and certain, it ſhall go in ſatisfaction of the debt; but if it be uncertain and contingent, it can be no ſatisfaction, becauſe it could not be ſo in its creation, and the happening of the contingency afterwards will not alter the nature of it.

† 1 Vezey, 221. 3 Atkyns, 96.

Another point in this caſe was, that lands were deviſed to truſtees, in truſt, out of the rents and profits to raiſe money to pay debts, and to ſettle the lands themſelves to ſeveral uſes; but becauſe it appeared that the rents and profits of the lands annually would not ſatisfy the debts in any reaſonable time, an account was directed to be taken of the teſtator's perſonal eſtate, and what that fell ſhort to pay off the debts, was to be made up by a ſale of part of the ſaid eſtate: and the Maſter of the Rolls ſaid, this was the common courſe of equity, where the rents and profits are not ſufficient to pay the debts in a reaſonable time; but if it had been directed to be raiſed out of the rents only, it would have been otherwiſe.

Gilb. Eq. Rep. 89. S. P. Gilb. Ch. 284. Ch. Caſes, 176. 3 Ch. Rep. 39. S. C. 2 Wms. 20. 666. 3 Wms. 1. 1 Atk. 549.

that the teſtator's intention was not that the legacy ſhould be in preſumption of the debt, they have leant againſt the rule, ſo far as to hold it not to be a ſatisfaction of the debt.

According to the moſt modern deciſions, it is preſumed, that the legacy muſt be in all reſpects *ejuſdem generis*, to cauſe a ſatisfaction of the debt, and an apparent intention in the will that the teſtator meant it as ſuch.

Note;

Note; *Paſch.* 2d *Georg.* Mr. *Vernon* cited a caſe of *Shelton* and *Dormer*, in my Lord *Somers*'s time, where a * like decree 396
was for a ſale of the lands for payment of a portion, deviſed to be paid at a certain time out of the rents and profits of ſuch lands, it appearing that the annual rents were not ſufficient to raiſe the portion by the time, though in that caſe the land ſubject to the portion was deviſed over to ſeveral others in remainder, one after another; but if any words in the will ſhew the teſtator's intent, that they ſhould be raiſed out of the annual produce only, no ſale ſhall be decreed.

*DE

Termino Paſchæ,

1715.

In Curia Cancellariæ.

Caſe 271.

Tompkins *verſus* Tompkins.

Gilb. Chan. 327. Gilb. Eq. Rep. 90. S. C.

A. deviſes 500 *l.* apiece to his three daughters, at their ages of 21, or marriage, *to be paid out of his ſtock*, and deviſes the *rents of his real eſtate* to his wife, for life, in lieu of dower, and for the maintenance of his children, and towards making up their portions; and *after his debts and legacies paid, deviſes the lands to his ſon*, who, together with his wife, he made executors. The ſtock was but of 100 *l.* value; the wife being dead, and the two eldeſt daughters having had their portions paid them, held that the lands were liable in the hands of the ſon to the youngeſt daughters portion.

THE plaintiff's father by his will, 1682, deviſed 500 *l.* apiece to the plaintiff, his daughter, and to two other daughters, to be paid at their reſpective ages of 21 years, or days of marriage, which ſhould firſt happen, the ſaid portions to be raiſed out of the ſaid teſtator's ſtock; and then deviſes the rents of his real eſtate to his wife for her life, in lieu and ſatisfaction of her dower, and for the maintenance and education of his children, and alſo for and towards the raiſing and making up the ſaid portions to his ſaid daughters, and then goes on, And after my debts and legacies paid and ſatisfied, I give and deviſe all my land, tenements, and hereditaments, to my ſon, (one of the defendants) and his heirs; makes his wife and the defendant his ſon executors, and dies, leaving in ſtock not above the value of 100 *l.* The wife enters, and the two other daughters marrying, had their portions paid them.

This

* This bill was now brought by the third daughter, who had attained her age of 21 years, and was unmarried, to have her portion: the wife had been dead ſome time, and the defendant, the ſon and ſurviving executor, inſiſted, that his lands ought not to be charged with the raiſing of this portion, in regard it was expreſsly directed to be raiſed out of the ſtock and rents of the eſtate during the wife's life; and that if the wife had exhauſted or conſumed the ſurplus of the rents, which ſhould have raiſed the plaintiff's portion, ſhe ought to fall on her aſſets; or, however, that the plaintiff could not lay the load on his eſtate, if the wife left no aſſets. 398

But the court was of opinion, that in this caſe the defendant's eſtate was chargeable to make up the portion to the plaintiff; for the ſeveral gradations in his will ſhew, that the portions were in all events to be made good to his daughters; and therefore he firſt charges them on his ſtock, and after deviſes them to be made out of the ſurplus of his rents, during his wife's life; and, laſtly, gives the lands to his ſon ſubject thereto, *by deviſing them to him after his debts and legacies paid, which, in a will, amounts to a charge on his lands for the payment thereof*, ſince the ſon by the will is not to have the lands till after the debts and legacies are paid. Brown's Rep. 119.

And therefore it was decreed, that an account ſhould be taken of the ſtock, and what the proportion thereof (after a proportionable deduction for the other two legacies) fell ſhort, ſhould be made up out of the like proportionable ſurplus of the rents during the wife's life, and what they fell ſhort to be ſupplied out of the defendant's eſtate.

But it was not determined with any clearneſs, whether, if the proportionable part of the ſtock, and of the ſurplus of the rents, which were appointed the fund, in the firſt place, for the payment of theſe legacies, were waſted by the wife, whether the loſs * thereof, as to the plaintiff's legacy remaining unpaid, ſhould fall on the plaintiff herſelf, or if ſhe ſhould, by reaſon of ſuch waſting, load the real eſtate ſo much the heavier to 399

make

make good her legacy; though my Lord Chancellor ſeemed to incline, that her legacy muſt, as this caſe was, be made good to her in all events out of the real eſtate, in caſe the other funds provided for it proved deficient, or were waſted, at leaſt ſo much thereof as by any miſapplication during her minority was loſt and gone of the other funds; though he ſaid, from the time of her attaining her full age, it might, perhaps, deſerve another conſideration.

Another point in this caſe was, that the defendant the ſon had mortgaged this eſtate to ſome other of the defendants, who had full notice of the will, as was proved in the cauſe, and whether they ſhould be affected with this legacy was the queſtion; though there was little ſaid in defence of this point, but that the defendants were only executors of the mortgagee, and knew nothing of the tranſactions in taking the mortgage.

Mr. *Vernon* argued, that in caſe there could be any doubt made of it, as he thought there could not; yet that the defendant the ſon, who received the money, would be chargeable therewith, and that the plaintiff might, in the nature of a *Ceſtuique Truſt*, proſecute him as a truſtee for recompence thereout, till her legacy paid, and cited the caſe of *Cherry* and *Ferrers* in this court to have been decreed accordingly.

But my Lord Chancellor ſeemed to turn this reaſoning upon him, that there the wife for the proportionable part of the ſurplus was but in the nature of a truſtee, and the plaintiff muſt expect her recompence for what ſhe had waſted out of her aſſets, and not load the ſon therewith; but it was decreed to an account as before is mentioned.

Linguen

* Linguen *verſus* Souray. Caſe 272.

Antè, 23. and references. 1 Wms. 172. S. C. more fully and accurately reported. Gilb. Rep. 91. S. C. 10 Mod. 528. S. C. 1 Eq. abr. 175. S. C.

By marriage articles, 700 *l.* being the wife's portion, together with 700 *l.* to be added to it by the husband, was agreed to be laid out in purchaſe of lands, to be ſettled in ſtrict ſettlement, with remainder in the uſual form to the heirs of the husband; before any purchaſe made, the husband dies without iſſue, having firſt deviſed his perſonal eſtate, which was of greater value than the 1400 *l.* but without taking notice of it, to his wife, and his real eſtate to his two nephews, one of whom was his heir at law. This money ſhall in a court of equity be looked upon as land, and the deviſe to the wife, which was of greater value, as a ſatisfaction thereof.

ON a treaty of marriage, articles were entered into, whereby the ſum of 700 *l.* being the wife's portion, and 700 *l.* more added to it on the part of the huſband, in all 1400 *l.* was agreed to be laid out in the purchaſe of lands, to be ſettled on the huſband for life; remainder to the wife for life; remainder to truſtees, to ſupport, *&c.*; remainder to the firſt and other ſons of that marriage, in tail male ſucceſſively; remainder to the iſſue female of that marriage; remainder to the right heirs of the huſband. The marriage takes effect; the huſband dies without iſſue, and before any purchaſe made purſuant to the articles, having firſt made his will; and thereby he deviſes all his perſonal eſtate to the defendant, who was his wife, and deviſes all his real eſtate to the plaintiffs, who were his nephews, and one of them his heir at law; makes his wife executrix, and takes no manner of notice of the 1400 *l.*

And now this bill was brought by the plaintiffs to have this 1400 *l.* as they would have had the land, if the purchaſe had been made purſuant to the articles. It appeared in the cauſe, that, at the leaſt computation that could be made, the wife had above 77 *l. per ann.* by the deviſe to her of the perſonal eſtate, which was 7 *l. per ann.* more than ſhe would be entitled to in caſe the purchaſe had been made; and therefore it was decreed the 1400 *l.* was bound by the articles, and ſhould go to the plaintiffs, as the land would have done, if a purchaſe had been made purſuant to the articles, and was in a court of equity to be looked upon as a real eſtate, and well deviſed to the plaintiffs by this will; and though the wife could not be ſhut out of the proviſion * intended her by the articles for life, if ſhe thought

fit

fit to abide by the articles, yet the deviſe to her of the perſonal eſtate being more than an equivalent, if ſhe choſe to take by the will, it muſt in a court of equity be taken as a ſatisfaction of the articles as to her, and no manner of hardſhip to her; and it was ſaid, that as this caſe is, that if a purchaſe had been made, even after the making this will, though at law ſuch lands would not paſs, yet in this court there could be no queſtion but the plaintiffs would have the benefit thereof, by the relation to the articles; and my Lord Chancellor was clear of the ſame opinion; and it was ſaid to have been ſeveral times held in this court, that if a man by his will gives ſeveral ſpecific legacies, and deviſes the reſidue of his eſtate to another, and his circumſtances vary, ſo that the reſiduary part becomes very inconſiderable, yet the reſiduary legatee muſt content himſelf with it, and ſhall have no aſſiſtance from the ſpecific legatees; no more ſhall the wife in this caſe, when the plaintiffs come to carry the articles into execution, which will take away ſo much of the perſonal eſtate; and this being ſo decreed by my Lord Chancellor *Harcourt*, was now, on a rehearing, affirmed by my Lord Chancellor *Cowper*.

Caſe 273.

Roach *verſus* Hammond.

1 C. Gilb. Eq. Rep. 92. in same words, except a few words in Italicks added at the end.

2 Chan. Rep. 146. 8vo. 1 Wms. 327. 1 Atk. 470. Caſes temp. Talb. 251. Brown's Rep. 31. —*è contrà*, 2 Vern. 381.

A man deviſes his perſonal eſtate to the uſe of his relations, without ſpecifying any in particular; it ſhall be diſtributed according to the Statute of Diſtributions.

A Man by his will, in 1704, deviſes all his real and perſonal eſtate to the defendant, *for the uſe of his relations*, without ſpecifying any in particular, or uſing any other words, makes the defendant his executor, and in 1706 died; and now the plaintiffs, who were the mother and three ſiſters of the teſtator, brought this bill, as neareſt relations, for a diſcovery and account of the perſonal eſtate, and the plaintiffs to come in according to the courſe of diſtributions ſettled by 1 *Jac.* 2 *Car.* 17.

402 * And it was agreed to be the rule of this court, in the conſtruction of ſuch deviſes to relations, that thoſe who by the Statute

Statute of Diſtributions would be entitled to the perſonal eſtate, in caſe he had died inteſtate, ſhould, upon ſuch general deviſes, be let in to the ſame proportions only; and my Lord Chancellor ſaid, he thought it the beſt meaſure for ſetting bounds to ſuch general words, and that it had been often ruled accordingly in this court.

Forrest. 251. ſeems confined to the proportions. But I think the decision there questionable.

Bawdes *verſus* Amhurſt. Caſe 274.

1 Eq. abr. 21, pl. 8. S. C. 2 Chan. Rep. 284. S. C. Gilb. Chan. 238. Antè, 208. 374. 380. Poſt, 526. 533. Vid. Lord Hardwick's obſervation upon this caſe, 3 Atk. 504.

ON the plaintiff's application in way of marriage to his new wife, the defendant's ſiſter, her father propoſed to give her a portion of 4500*l.* and the plaintiff propoſed to ſettle on her, by way of jointure, a rent charge of 450*l. per ann.* and in order thereunto, the plaintiff and the young lady's father went to Mr. *Minſhull*'s chambers in the *Temple*, who was to draw the ſettlement, as counſel for the lady, and Mr. *Minſhull* hearing the propoſals on both ſides, took down minutes or heads thereof in writing, and the ſame day gave them to his clerk, to draw articles according to the ſubſtance thereof: the next day the young lady's father was taken ill ſuddenly, and died in about two hours after: the next morning the plaintiffs intermarried, and now brought this bill to compel a ſpecific execution of the marriage agreement, and to have the portion paid. The defendant pleaded the Statute of Frauds and Perjuries, and on arguing that plea, the benefit thereof was ſaved to the hearing.

On a marriage treaty, the intended huſband and the young lady's father went to a counſellor's chambers, to have, in conſideration of the portion the father propoſed to give, a ſettlement drawn; minutes of the agreement were taken down in writing by the counſel, and given by him to his clerk to be drawn up in form: the next day the father dies, and the day following the marriage was ſolemnized.

This agreement, notwithſtanding theſe preparations, held to be within the Statute of Frauds and Perjuries.

It was now argued by Mr. *Cooper* and Mr. *Vernon* for the plaintiffs, that this was ſuch an agreement as a court of equity might well carry into execution; that the ſtatute did not require all agreements to be ſigned by the parties themſelves, but if they were ſigned by * any one lawfully authorized thereto, it was ſufficient; that here Mr. *Minſhull* had authority and directions from both parties to draw the articles; that he took down

down theſe minutes or heads from the parties' own mouths, and reduced them into writing; and that therefore this could not be looked upon as a parol agreement, or any danger of perjury, ſince there was a writing of it, nor could there be any variety of evidence concerning it; for the ſame reaſon, that in the caſe of † *Maſcall and Cooke*, in this court, where only a draught of a marriage ſettlement was prepared, and before it was ingroſſed the parties intermarried, and the father was preſent, and gave the wedding dinner, he was afterwards decreed to pay the marriage portion, though the agreement was never ſigned by either party; that in ſeveral caſes, though there be nothing of the agreement reduced into writing, yet it has been decreed to an execution in this court; ‡ as if a man, by his anſwer, confeſſes the agreement as charged in the bill, he cannot avoid it, by inſiſting it was never reduced into writing, becauſe, when he himſelf confeſſes it, there can be no danger of perjury or contrariety of evidence; no more can there be in this caſe, when there is a writing or memorandum of the ſubſtance.

† 2 Vern. 200. S. C.

‡ Antè, 208. 364.

But it was argued on the other ſide, and decreed to be no ſuch agreement as this court could carry into execution; and my Lord Chancellor ſaid, he had been always tender in laying open that wiſe and juſt proviſion the parliament had made; that the act had not only directed ſuch agreements to be in writing, as if that alone were ſufficient, but went further, and directed them to be ſigned by the parties themſelves, or ſome other lawfully authorized by them for that purpoſe; that to obviate the pretence of ſuch and ſuch caſes being out of the miſchief of the ſtatute, the parliament had in general words comprehended all, and directed that all agreements ſhould be in writing, and ſigned by the party; that he knew no caſe where an * agreement, though it were all written with the party's own hand, had been held ſufficient, unleſs it had been likewiſe ſigned by the party, and ſaid, that the party's not ſigning it was an evidence that he did not think it compleat; that he had left it to an after conſideration, and might afterwards make alterations or additions in it; and therefore, unleſs it were either ſigned

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ſigned by him, or ſomething equivalent done, to ſhew that he looked upon it as compleated and perfected, he thought ſuch writing by the party himſelf was not ſufficient to bind him within that ſtatute, and cited the caſe of † *Mallet and Halfpenny*, where the defendant, on a treaty of marriage for his daughter with the plaintiff, ſigned a writing, compriſing the terms of the agreement, and afterwards deſigning to elude the force thereof, and get looſe from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then to marry him, which ſhe accordingly did, and the defendant ſtood at the corner of a ſtreet to ſee them go to be married, and afterwards forced the plaintiff to bring his bill in this court to be relieved; and my Lord Chancellor ſaid, he remembered very well, that this cauſe was heard before the Maſter of the Rolls, and the plaintiff had a decree; but he ſaid, this was on the point of fraud, which was proved in the cauſe, and *Halfpenny* walked backwards and forwards in the court, and bid the Maſter of the Rolls obſerve the ſtatute, which he humorouſly ſaid, *I do, I do.* And in the principal caſe it was decreed to be no agreement, which this court could carry into execution, being only preparatory heads, which were afterwards to be drawn into form, and might then receive ſeveral alterations or additions, or the agreement entirely broke off, upon ſome further enquiry or information of the parties' circumſtances.

† 1 Eq. abr. 20, pl. 6. S. C. 2 Vern. 373. S. C.

But *Note*; It ſeemed to be agreed, both by the court and counſel, that if the marriage had been had upon the foot of this writing, and the father had been privy * and conſenting to it, that he ſhould afterwards have been obliged to execute his part thereof.

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Beal *verſus* Beal. Caſe 275.

Antè, 337, and 367. Gilb. Chan. 329. Gilb. Rep. 93. S. C. 1 Wms. 244. S. C. but not S. P. 2 Wms. 419. 2 Atk. 343. 1 Vezey, 277. 2 Vezey, 487.

Portions *what intereſt to carry, and from what time.*

THIS was a rehearing, and the caſe appeared to be ſhortly this: The plaintiff's father being tenant for life, with remainder to his brother in tail, prevails on his brother to join

with him in a common recovery, whereby the eſtate was ſettled to the uſe of the plaintiff's father for life; remainder to truſtees, during his life, to ſupport contingent remainders; remainder to ſuch woman as he ſhould afterwards happen to marry, for life, for her jointure; remainder to the firſt and other ſons of the plaintiff's father, in tail male ſucceſſively; remainder to the brother in tail; remainder to the right heirs of plaintiff's father; and in the deed, declaring the uſes of the recovery, was a proviſo, that it ſhould be lawful for the plaintiff's father, by writing, or laſt will, to charge the eſtate with any ſum or ſums of money, not exceeding 2000*l.* for the portions of daughters or younger ſons, to be paid at ſuch times, and by ſuch proportions, as the father ſhould direct. The father afterwards marries the defendant, and by her had iſſue only two daughters, the now plaintiffs; and by his will, taking notice of his power, appoints the ſum of 2000*l.* to be raiſed out of the ſaid eſtate, for his ſaid two daughters, and to be paid and payable to them at their reſpective ages of 18 years, or days of marriage, which ſhould firſt happen, without ſaying, after the death of his wife, or any proviſo that it ſhould not affect the wife's jointure, and then the father dies.

And now this bill was brought by the two daughters, who were under 18, and unmarried, to *have intereſt* for their portions till payable. My Lord Chancellor *Harcourt* decreed, that they ſhould have intereſt, after the rate of 3 *per cent. per ann.* for their portions till 12 * years of age, and from thence, till payable, 4*l. per cent.*; but they not liking this decree, brought on the cauſe again, and preſſed very much for an allowance of 6*l. per cent.* for their portions till payable.

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But my Lord *Cowper* ſaid, he thought the former decree very tender in the proviſion thereby made; and that it was rather a recommendation to the mother to make them that allowance, than a decree to charge her jointure therewith; but ſince they were not ſatisfied with that decree, as appeared by their bringing the cauſe to a rehearing, he muſt now give them no more than what in ſtrict juſtice they could demand; and that ſince their

portions were not payable till 18, or marriage, he could not charge the jointreſs with intereſt thereof in the mean time; but ſaid, that the reaſon of poſtponing the payment thereof till that time being in favour of the jointreſs, ſhe ought to maintain them out of the profits of her jointure lands; but in regard the ſaid portions could not in ſtrictneſs carry intereſt till they became payable it was decreed, that from the time they became payable they ſhould be allowed 6 *l. per cent.* intereſt for the ſame; § and whether the portions on the daughters attaining the age of 18 years, or marriage, ſhould be immediately raiſed, ſo as to charge and affect the jointure eſtate for life, or wait till her death? my Lord ſaid, it would be time enough to conſider of that, when that came to be the caſe.

§ As to this queſtion, vid. 2 Vern. 655. 760. and 1 Wms. 448. 2 Wms. 484. 591. 1 Atk. 549. 2 Atk. 354. 3 Atk. 416.

* D E

Termino S. Trinitatis,

1715.

In Curia Cancellariæ.

Caſe 276.

Challis *verſus* Caſborn.

1 Eq. abr. 324, pl. 1. Gilb. Eq. Rep. 96. S. C. 1 Vern. 244, 245. Antè, 89. 1 Wms. 775. 2 Atk. 53. 3 Atk. 556. 630. *See post. 5 11.*

A mortgagor who borrows more money from the mortgagee on his bond, ſhall redeem without paying the bond debt; but his heir cannot, neither can the deviſee of the equity of redemption, ſince the ſtatute againſt fraudulent deviſes.

IN this caſe it was ſaid by Mr. *Vernon*, and agreed to by the court, that if a man has a debt owing to him by mortgage, and another on bond from the ſame perſon, that he cannot tack them together againſt the mortgagor, but that he ſhall be let into a redemption on payment of the mortgage money only; but the heir in ſuch caſe ſhall not be let into a redemption without payment of both, becauſe the land in his hands is chargeable with the bond, even at law; and now, ſince the ſtatute againſt fraudulent deviſes, the deviſee of the equity of redemption is in the ſame caſe, and cannot redeem without payment of both, becauſe the ſtatute makes ſuch deviſe void, as againſt creditors, and then the deviſee ſtands in the ſame place as the heir muſt have done if no deviſe had been made; but before that ſtatute, ſuch deviſee would not be liable to the bond debt, any more than the mortgagor himſelf.

Another

† *Another point* in this caſe was, that a man, ſeiſed of ſome freehold eſtate, and alſo of a copyhold eſtate, deviſed all his real and perſonal eſtate for the payment * of his debts, and died without any ſurrender of the copyhold eſtate to the uſe of his will; and whether this court would ſupply the want of ſuch ſurrender, as they would have done if the copyhold eſtate had been expreſsly mentioned in the will as copyhold? Mr. *Williams* ſaid, the Maſter of the Rolls had ſupplied the defect of a ſurrender in ſuch a caſe, where there was no freehold at all; and he thought it the ſame caſe here, where the freehold eſtate was not ſufficient for payment of the debts.

† Poſt, 449. Eq. abr. 124, pl. 13. S. P. 325, pl. 9. ‖ Caſes temp. Talb. 78, 79. 1 Wms. 443, 444. Brown's Rep. 273.

But my Lord Chancellor ſaid, he had never known it carried ſo far, becauſe he thought the deviſe of his real eſtate did not ſhew an intention to paſs a copyhold, which in the eye of the law was of the loweſt regard, and looked upon only an eſtate at will, though cuſtom had now fixed it in the copyholder; and ſaid, unleſs they could ſhew ſome precedents, he could not aſſiſt them.

‡ A third point was, that the deviſees of the real and perſonal eſtate were made executors; and therefore Mr. *Vernon* ſaid, it was a ſettled diſtinction in this court, that they ought to apply the eſtate in ſuch caſe in a courſe of adminiſtration, becauſe, if the eſtate were ſold, it would be perſonal aſſets in their hands, and then to pay a debt of an inferior nature before one of a ſuperior would be a devaſtavit; but if they had not been made executors, then the creditors ſhould have come in all equally, becauſe in equity all debts are equal, and they as truſtees could give no preference, and would be in no danger as executors in ſuch caſe.

‡ Antè, 127. 136.

But my Lord Chancellor thought the accident of their being made executors ought to make no difference in equity, but that all creditors ſhould be conſidered equally; and would ſee precedents, though Mr. *Vernon* ſaid, it had been a ſettled diſtinction, and ſeveral precedents in point.

‖ In theſe Caſes it is held, that the copyhold eſtate is liable, in caſe the freehold is inſufficient for the payment of debts. Same point determined in *Gibſon* v. *Coombs* (Brown, 273.) which appears to be the moſt modern authority.

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Caſe 277.

* Read *verſus* Duck.

If a loſs happens to a freeman of *London*'s eſtate, by the inſolvency of his executors, ſuch loſs ſhall be borne out of the teſtamentary part of his eſtate only, and not out of the whole perſonal eſtate.

IN this caſe a queſtion aroſe upon a freeman of *London*'s will, upon what part of the teſtator's eſtate the loſs, which was occaſioned by the failure of the executors, ſhould fall; and it was referred to a Maſter to ſtate a caſe to be ſent to the Recorder of the city, to certify it to the court; and the caſe as ſtated was thus:

Whether, by the cuſtom of the city of *London*, the loſs which befalls a freeman's eſtate, by the inſolvency of his executors, ought to be borne out of the teſtamentary part of his eſtate only, or out of the whole perſonal eſtate, as well cuſtomary as teſtamentary?—To which it was certified,

We the Lord Mayor and Aldermen of the city of London, *whoſe names are under-written, in obedience to the ſaid order, by* William Thompſon, *Eſq; Recorder of the ſaid city, humbly certify unto your Lordſhip, that if a freeman of* London *dies, leaving a widow and children, his perſonal eſtate, after his debts paid, and the cuſtomary allowance for his funeral, and the widow's chamber being firſt deducted thereout, is by the cuſtom of the ſaid city to be divided into three equal parts, and diſpoſed of as follows*; viz. *One third part belongs to the widow, another third part to the children unadvanced by him in his life-time, and the other third part ſuch freeman may diſpoſe of by his will as he pleaſes*; *but where a loſs of the freeman's eſtate by the inſolvency of his executors happens, there is not any cuſtom of the city of London which directs, whether ſuch loſs ought to be borne out of the teſtamentary part of his eſtate only, or out of his perſonal eſtate, as well cuſtomary as teſtamentary.*

410 * This report of the Lord Mayor and Aldermen being returned back to the Lord Chancellor *Cowper*, the matter was again debated by counſel before his Lordſhip, who was of opinion, that the

the widow and orphans of a freeman of *London* are in the nature of creditors, and ſhall have two parts in three of the perſonal eſtate he ſhall die poſſeſſed of; and that if any loſs happen by the inſolvency of his executors, ſuch loſs ought to be borne by the legatees of a freeman, entirely out of his teſtamentary part: and the ſame was in this caſe decreed accordingly; ſo that the widow and orphans had two full thirds of the freeman's eſtate, as if no ſuch loſs had been.

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Termino S. Mich.

1715.

In Curia Cancellariæ.

Caſe 278.

Caſey *verſus* Beachfield.

Gilb. Eq. Rep. 98. S. C.

A plaintiff in a cauſe cannot be made a witneſs; but a defendant may, becauſe he is forced into the ſuit.

IN this caſe it was ſaid by Mr. *Vernon*, that the reaſon you cannot examine any of the plaintiffs as witneſſes in the cauſe is, becauſe, if the cauſe miſcarries, the plaintiffs will be liable to coſts; and therefore their ſwearing is to exempt themſelves, and it is their own choice that they are made plaintiffs, for without their conſent they could not be made ſo; but defendants are forced into the cauſe, and if their being made parties ſhould abſolutely invalidate their teſtimony, it would be in the power of any one, who had a mind to oppreſs another, to deprive him of his defence, by making the moſt material witneſſes defendants in the ſuit; and therefore any of the defendants to a ſuit may be examined as witneſſes, ſaving juſt exceptions to their credit, *&c.*

Packer

Packer *verſus* Wyndham. Caſe 279.

Ante, 63, and 312. Gilb. Chan. 277. 3 Wms. 199. S. C. (n.) 1 Wms. 378. Gilb. Eq. Rep. 98. S. C. Caſes temp. Talb. 168.—See 4 Viner, 47, pl. 34. 2 Atk. 208. S. C. cited. 421. 2 Vezey, 677.

Where the wife's fortune, though the huſband made no ſettlement on her, ſhall go to the creditors and repreſentatives of the huſband, and not to the repreſentatives of the wife.

THE only queſtion in this caſe was, Whether any, and what part, of the wife's fortune ſhould be ſubject to anſwer the plaintiffs demands, who were ſiſters and heirs at law, and alſo adminiſtrators and creditors of the huſband, againſt the defendant, who was adminiſtrator of the wife, who ſurvived her huſband? As to which, the caſe was thus: Mrs. *Anne Aſh* being entitled to the ſum of 5500 *l.* ſecured to her by a mortgage for years on the eſtate of Sir *Edmond Bacon*, taken in the name of truſtees; and likewiſe to 3000 *l.* ſecured to her by a mortgage for years on the eſtate of Sir *Humphry Briggs*, taken in her own name; and alſo to a bond debt of 400 *l.* and to ſeveral jewels, and other things of conſiderable value—The ſaid Mrs. *Aſh* became a lunatic, and on a commiſſion of lunacy, iſſued out for that purpoſe, the cuſtody of her perſon and eſtate was committed to one of the defendants. † Some time after, *Philip* † 2 Wms. 111. *Parker*, Eſq; the plaintiff's brother, by ſome contrivance got the lunatic, and married her, *without making any ſettlement or proviſion for her*; and for this contempt he and others, concerned in procuring the marriage, were committed by this court to the *Fleet*, (but on a ſuit in the Spiritual Court, the marriage was ſentenced to be good, and that ſentence afterwards affirmed on an appeal to the delegates); and it was ordered at the ſame time, that all the deeds and ſecurities relating to the lunatic's fortune, and alſo the jewels, ſhould be brought and lodged with one of the Maſters of this court, in order to ſecure ſome proviſion for the wife, in caſe ſhe ſhould ſurvive her huſband; and likewiſe for the children of that marriage, in caſe there ſhould be any.

Some time after, on Mr. *Packer*'s application to the court by petition, the commiſſion of lunacy was ſuperſeded; but in regard Mr. *Packer*'s eſtate was much * incumbered, and he had

had made no ſettlement on his wife, it was at the ſame time ordered, that ſo much of the 5500*l.* as was neceſſary, ſhould be applied towards diſencumbering his eſtate, and the reſidue to be laid out in a purchaſe of lands, which, together with ſo much of Mr. *Packer*'s eſtate as would make up 500*l. per ann.* was to be ſettled on Mr. *Packer* for life, with remainder to his wife for life, for her jointure; remainder to the iſſue of that marriage, *&c.* with remainder to Mr. *Packer*'s right heirs; and upon Mr. *Packer*'s making ſuch ſettlement, the reſidue of his lady's fortune was to be paid and delivered to him; and in the mean time he was to be examined upon interrogatories touching incumbrances on his eſtate.

Mr. *Packer never complied with any part of this order*; but being indebted to one *Gooding* in a conſiderable ſum of money, *Gooding* brings his action againſt him, and recovers judgment, and took out a *Fi. Fa.* and thereupon the mortgage term of Sir *Humphry Briggs* was ſold by the ſheriff, and the debt paid.

After this, Mr. *Packer* being indebted to the plaintiffs, his ſiſters, in about 2000*l.* apiece, given them for their portions, does by indenture, taking notice thereof, *aſſign the ſaid* 5500*l. and all ſecurities taken for the ſame*, and alſo all other the fortune and portion belonging to him in right of his wife, to truſtees, in truſt, in the firſt place to pay thereout to the plaintiffs their portions, and after in truſt for himſelf, his executors and adminiſtrators.

Some time after Sir *Edmond Bacon* paid in the 5500*l.* due on his mortgage, and Mr. *Packer* not having complied with the terms of the laſt order, that ſum was again placed out at intereſt, on a ſecurity taken, in the name of a Senior Maſter of this court; after which Mr. *Packer died inteſtate, and without iſſue*; and about two years after Mrs. *Packer died likewiſe inteſtate*, and without iſſue; whereupon the plaintiffs, who were ſiſters and heirs at law to Mr. *Packer*, and alſo creditors as
414 * above mentioned, took out letters of adminiſtration to him, and the defendant *Wyndham* took out letters of adminiſtration to Mrs.

Mrs. *Packer* the wife, and brought a croſs bill to have the fortune and ſecurities delivered over to him.

For the plaintiffs in the original cauſe it was argued, that they had an undoubted right to this fortune of the wife's, not only as they were creditors, but alſo as they were repreſentatives and heirs at law to the huſband; that if the ſettlement had been made purſuant to the order, the laſt limitation being to the right heirs of Mr. *Packer*, would have carried the lands to them; that though no ſettlement were made, yet as repreſentatives to Mr. *Packer* they were entitled to it, ſo that call it land, or call it money, yet it equally belongs to the plaintiffs; that a *Choſe* in action belonging to the wife may be releaſed by the huſband, and if truſtees for the wife's fortune ſhould pay it to the huſband, his wife would be without any remedy; that a wife on her marriage is to forſake father and mother, and cleave to her huſband, and ſurely her fortune is to go along with her; that a huſband may maintain trover for his wife's goods taken from her before marriage, without joining her in the action, ſo is 2 *Lev.* 107; † and if a huſband before marriage agrees to make a ſettlement on his wife, and afterwards makes the ſettlement accordingly, this entitles him to all her fortune, eſpecially if it were made in conſideration of that fortune, and therefore his repreſentatives ſhall go away with it, though the wife ſhould ſurvive, and this has been ſeveral times ſettled in this court; and here, though no actual ſettlement has been made, yet the wife has had the benefit of her fortune preſerved to her for life, which is all ſhe ſhould have had in caſe the ſettlement had been made; that ſhe being dead, and no children to be provided for, her fortune ought to go over to her huſband's family, and not return to her own; that though *Choſes* in action are not aſſignable at law, yet ſuch * aſſignments are ſupported every day in this court, and the plaintiffs in this caſe are creditors, and therefore more ſtrongly entitled to the benefit of the huſband's aſſignment; that theſe ſecurities being lodged in the court, makes no manner of difference, for the court is but in the nature of a truſtee of them for the wife, and has no property

† Antè, 68.

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perty therein, but the property is ſtill in the wife, and conſequently in the huſband; that any diſpoſition by *Ceſtuique Truſt* is binding upon the truſtee in a court of equity, and even at law; if the huſband brings debt on the wife's bond, and recovers judgment, this alters the nature of the ſecurity, and makes it the huſband's; and ſo it has been lately adjudged in the King's-Bench, where ſuch a judgment was held aſſignable within the ſtatutes of bankrupts for the benefit of the huſband's creditors, for when the huſband recovers judgment, the debt is turned into *rem adjudicatam*, and is no longer a *Choſe* in action.

But my Lord Chancellor ſeemed to think that ſuch judgment would not have carried it to the huſband's repreſentatives againſt the wife ſurviving, if that had been the point of the caſe.

It was likewiſe urged, that the order of the 19th of *March* had not at all varied the caſe, for the intent thereof was only to ſecure ſome proviſion for the wife; and ſhe being now dead, that order has had its effect, and the plaintiffs, who ſtand in the huſband's place, ought to have the reſidue of the wife's fortune.

On the other ſide it was argued, that by this commiſſion of lunacy againſt the wife, the property of her fortune was veſted in the crown, and this being in force at the time of the marriage, prevented the huſband's power over it; that he had indeed been very juſtly committed for his contempt in marrying her, but that would be a very inſignificant puniſhment, if he might at the ſame time go away with all her fortune; that at leaſt the crown had a power to preſerve the eſtates and fortunes
416 of lunatics againſt any diſpoſition * of their own, and that power was lodged in this court; that the court had more than a bare cuſtody of this lady's fortune; that by the order of the 19th of *March*, Mr. *Packer* was not to have any part of her fortune till he made the ſettlement thereby ordered; that this was in the nature of a condition precedent, and he not having performed his part thereof, had no title to the fortune; that

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the huſband's aſſignment could not be pretended to affect the 3000*l.* on Sir *Humphry Brigg*'s mortgage, the ſheriff having made an abſolute ſale of the legal term on the *Fi. Fa.* before that aſſignment, and the vendee by that ſale was become the abſolute owner thereof: and Mr. *Vernon* cited a caſe of † *Burnet and Kinaſton*, where the wife having a ſum of 1400*l.* out upon mortgage, the huſband after marriage made an aſſignment of this money, and agreed, that when it was paid in, the truſtees ſhould inveſt it in the purchaſe of lands, to be ſettled to ſeveral uſes; then the huſband died, and afterwards the wife died before the money was paid in, and it was decreed for the repreſentatives of the wife againſt the repreſentatives of the huſband; the reaſon of which caſe he ſaid was, that the huſband could transfer no more to another than he himſelf had; that he had but a power of calling in this money, and if he had made uſe of that power and received it, the property had been abſolutely in him; that his aſſignee, who ſtood in his place, could have no other intereſt than the huſband himſelf had; and ſince the aſſignee did not reduce it into poſſeſſion during the huſband's life, the wife being the ſurvivor, became entitled to it as a *Choſe* in action, and conſequently it muſt go to her repreſentatives; and this he ſaid was a caſe in point.

† Antè, 118. 2 Vern. 401. Eq. abr. 69, pl. 5.

It was likewiſe urged, that if this fortune ſhould go to the repreſentatives of the huſband, it might have proved a very great hardſhip on Mrs. *Packer*, for ſhe might have married again, and had children, and they muſt have been left deſtitute of any proviſion; that as to the * huſband's aſſignment, it was general, and if ſuch general aſſignments ſhould prevail, it would ſoon put an end to the doctrine of chattels real, and *Choſes* in action, ſurviving to the wife, for then it would be only for the huſband, immediately after marriage, to make a general aſſignment of all his wife's fortune, and that would prevent their taking any thing after his death, though nothing more were done by the huſband to alter the property; that as the plaintiffs could with no colour aſk the decree they are now ſeeking for againſt the wife herſelf, if ſhe were living, no more ought they to prevail againſt the defendant, who is her repreſentative, and ſtands

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in

‖ 2 Vent. 340. 1 Chan. Ca. 181. Eq. abr. 156, p. 11. S. C.

in her place: and Mr. *Vernon* cited a caſe of ‖ *Pheaſant and Pheaſant*, where a man married a city orphan without the leave of the court of orphans, and for this he was committed and fined; and ſometimes that court has fined a man in ſuch caſe to the full value of the wife's fortune; yet that court is of much inferior juriſdiction to this; and though ſuch proceedings may perhaps be ſomewhat arbitrary, yet they have never been condemned or prohibited; and therefore he ſubmitted it to the court, whether Mr. *Packer*'s marrying his lady, who was then under the care and protection of this court, without their leave, was not ſuch a contempt as might amount to a forfeiture of her fortune.

And it was urged by moſt of the counſel for the defendants, that the power of the crown over lunatics was ſuch a prerogative as veſted their fortunes in the crown, though the committee was accountable for the profits to the relations of the lunatic, or to the lunatic himſelf, if he recovered; and if ſo, the poſſeſſion of the wife was diveſted before her marriage, and conſequently the huſband had no power to diſpoſe of her fortune; but this was thought by ſeveral to be no law, and the court ſeemed to think it of ſo little weight, that no anſwer was offered to it.

418 * *Lord Chancellor.* As to the marriage, that is now out of the caſe, having had its agitation in a proper court, and a ſentence pronounced for it; and therefore it is to be looked upon as valid and good. As to the order, 19th of *March*, I think that is likewiſe out of the caſe, for as the huſband, if he had complied with the terms of that order, had been a purchaſer of his wife's fortune, ſo he having not complied with them, it is now as if no ſuch order had been made; ſo, on the other hand, *the wife being now dead, and no children left*, the reaſon for this court's interpoſing is at an end; and then, as to the 5500 *l. that being paid in during the coverture, was the huſband's money, and the property abſolutely veſted in him by law*; and though this court thought fit to lay their hands on it, and had power ſo to do, being paid into the Maſter's hands, yet that was only *in the nature*

nature of a caution, till the huſband ſhould make ſome proviſion for his wife: *it was the huſband's money*, but the court had a power to detain or keep it from him till he made ſuch proviſion; but the wife *being now dead*, and *no children to be provided for*, the reaſon of their keeping the money from him is at an end; and then *æquitas ſequitur legem*, the court muſt give it to the huſband's repreſentatives, *to whom by law it belongs*. As to the 3000*l.* on Sir *Humphry Brigg*'s mortgage, that being ſold by the ſheriff on a *Fi. Fa.* before the huſband's aſſignment, muſt take place againſt the aſſignment, though perhaps the plaintiffs may have an equity to the remainder, after payment of *Gooding*'s debt; for the huſband may *aſſign over a term or mortgage for years, which he has in right of his wife, and ſo he may likewiſe the truſt of ſuch term, and this ſhall prevail againſt the wife, though ſhe ſurvives*; and this will be different from the caſe of *Burnet and Kinaſton*, for in that caſe the mortgage to the wife ‡ *was a mortgage in fee, which the huſband alone could not diſpoſe of*, and therefore the eſtate being ſtill in the wife, carried the money along with it to her and her repreſentatives, * but *of a term for years, or the truſt of ſuch a term, the huſband has the abſolute power, and may diſpoſe of it without his wife's joining with him*; and therefore this aſſignment of his to the plaintiffs might have been good, if it had not been for the antecedent ſale by the ſheriff; but, however, this queſtion is not now before me, and till you bring on the cauſe againſt *Gooding*'s creditors, I ſhall ſay nothing further in it.

Vid. Antè, 118. ‡ 1 Wms. 458. 461. ‡ 2 Atk. 208.

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As to the bond of 400*l.* that I think was plainly a *Choſe* in action, and muſt go to the defendants, notwithſtanding the huſband's aſſignment, becauſe it was a thing not aſſignable at law, and here ſeems no equity to ſupport it againſt the defendants; but as to the jewels, they muſt go to the plaintiffs, for this court kept them but as a pledge or caution, and the property was ſtill in the wife, and conſequently in the huſband, and here no tort or tortious act to diveſt that property, and turn it into a *Choſe* in action, for the poſſeſſion of the court was not ſuch; and therefore the plaintiffs, as repreſentatives of the huſband, have

†Gilb. Ch. 277. 1 Atk. 280. 2 Atk. 208.

have a right to them likewiſe: and he ſaid, † the difference between a bond, or ſuch like, and a term for years, whereto the huſband was entitled in right of his wife, was that, though the bond, *&c.* was merely a *Choſe* in action, and not aſſignable by law; yet a term for years was only a chattel real, which the huſband might aſſign by law without his wife, and ſo he might the truſt of ſuch term, and conſequently the money ſecured by it.

Caſe 280. Demandray *verſus* Metcalf.

2 Vern. 691, and 698. S. C. 1 Eq. abr. 324. 4. S. C. Gilb. Rep. 104. S. C. 1 Atk. 229. 236. S. C. cited.

A. borrows 200*l.* on the pawn of ſome jewels; afterward he borrows three ſeveral ſums, for each of which he gives his note, *without taking notice of the jewels:* his executors ſhall not redeem the jewels without paying the money due on the notes.

THIS was a caſe wherein my Lord Chancellor took time to conſider, and be attended with precedents, and was ſhortly thus: A man borrows 200*l.* on the pawn of ſome jewels, worth about 600*l.* and takes a note from the pawnee, acknowledging the jewels to be * in his hands for ſecuring of the 200*l.*; afterwards the pawner borrows, at ſeveral times, three ſeveral other ſums of money of the pawnee, and gives his note for each ſum, *without taking any manner of notice of the jewels*, and dies.

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His executors brought this bill to redeem the jewels, on payment of the 200*l.* firſt lent thereon, and intereſt; and the only queſtion was, Whether they ſhould not likewiſe pay the other ſums ſecured by their teſtator's notes before they ſhould be admitted to redeem? And the plaintiffs were to produce precedents, that the redemption might be on payment of the firſt ſum and intereſt only, but could not find any precedents.

My Lord Chancellor now gave his opinion, that the plaintiffs muſt pay all the money due on the ſeveral notes; and ſaid, ſince there were no precedents to guide him, he thought the conſtant maxim of this court ſufficient for that purpoſe, *viz. that he who will have equity, or comes hither for equity, muſt do equity*; and ſince the plaintiff cannot have back theſe jewels, without the aſſiſtance of this court, it is reaſonable and juſt he

ſhould

ſhould pay the defendant all monies due to him; for it is natural to ſuppoſe the pawnee would not have lent him thoſe ſums but on the credit of the pledge he had in his hands before; and ſaid, the neareſt caſe he could find that came to this was, the caſe of *St. John* and *Holford*, 1 *Chan. Caſes*, 97. though he agreed that caſe might be diſtinguiſhed from this, being between the heirs of the mortgagor and ſureties; but he ſaid, though the reaſon he now gave for his opinion be not mentioned in that caſe, as the reaſon of the reſolution, yet the caſe would well enough have admitted it, and the decree was accordingly; but Mr. *Vernon* ſaid, if there had been any creditors of the pawner by bond, or a commiſſion of bankruptcy out againſt him, the defendant muſt come behind them for his debts on the ſeveral notes, and could not have tacked them to the pawn, ſo as to prefer himſelf before them; but that not being * the preſent caſe, my Lord decreed, that if the plaintiff would redeem, the time for payment being lapſed, he muſt pay all; and he likewiſe declared his opinion, that if the firſt ſum had been ſecured by a mortgage of lands, he ſhould not have been admitted to redeem after the day for payment was lapſed, without paying likewiſe all that was due to the mortgagee on notes, or ſimple contract; otherwiſe, if ſuch ſubſequent debts had been ſecured by bond. 3 Atk. 630.

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Seal *verſus* Seal. Caſe 281.

1 Coke's Inſt, Harg. ed. 20. b. 3 Chan. Caſes, 1. 1 Peer Wms. 290. S. C. Brown's Rep. 170. Fearne's Cont. Rem. 345 to 384.

A deviſe of a perſonal eſtate to one in tail, remainder over, the remainder is void.

IN this caſe, a man being ſeiſed of a good real eſtate, and alſo poſſeſſed of a conſiderable perſonal eſtate, and having an intention to ſettle and ſecure both in his name and family, does by his will, in writing, after ſeveral legacies and bequeſts, give and deviſe all the reſt and reſidue of his real and perſonal eſtate to the plaintiff, and the heirs male of his body to be begotten, for ever; and for want of ſuch iſſue, to the defendant, and the heirs male of his body to be begotten, for ever; with like remainders over to ſeveral others of the ſame name; and makes the defendant his executor, and dies.

And now this bill was brought to have an account of the perſonal eſtate, and that the plaintiff might enjoy the ſame to his own uſe abſolutely, the remainder over being void; and the defendant brought a croſs bill, upon pretence that there were directions in the will to have the whole perſonal eſtate veſted in the purchaſe of lands, to be ſettled in the manner above mentioned.

But upon reading of the will, my Lord Chancellor was clear of opinion, that theſe directions extended only to ſuch part of the perſonal eſtate as was not upon government ſecurity (which was about 8000*l.* or 9000*l.*); and for the reſidue, which amounted to about 14 or 15000*l.* that was plainly taken no
422 further notice of * than in the deviſe above mentioned, of all the reſt and reſidue of his real and perſonal eſtate.

For the plaintiff it was ſaid, as to that, that the deviſes over were abſolutely void, and the whole veſted in the plaintiff, as not being capable of bearing any further limitation, and this point the defendant's counſel gave up; but then they inſiſted, that the intent of the teſtator appearing to be to continue the real eſtate, and the lands to be purchaſed, in the name of the teſtator, this court would order the ſettlement to be made in ſuch manner, that the plaintiff might not have power to defeat the remainders; and therefore, that the plaintiff ſhould be only made tenant for life, with remainder to his firſt and other ſons in tail male, and ſo for the others in remainder; and the Attorney General ſaid, the Houſe of Lords had, in a caſe lately, made the like proviſion for the benefit of the iſſue, that they might not be defeated by the father.

† 1 Wms. 145. 422. † But my Lord Chancellor ſaid, it was in a caſe of marriage articles, where the intent was plain to provide for the iſſue of the marriage; but here the teſtator himſelf has expreſsly given it to the plaintiff in tail male; and therefore he thought this court could not vary the limitation; beſides, that the defendant has a chance for the remainder, if the plaintiff ſhould die without iſſue before any recovery ſuffered; and mentioned a caſe where ſuch remainder took place by the death of tenant in tail

tail without iſſue, before he could compleat a recovery; and therefore ordered a ſettlement in this caſe to be made in the like manner, and the deeds and writings to be brought before the Maſter for that purpoſe.

* Howell *verſus* Price.

1 Eq. abr. 270, p. 7. Gilb. Eq. Rep. 106. S. C. 1 Wms. 291. S. C. 3 Wms. 360. 2 Vern. 701. S. C. Poſt, 477.

A mortgage in fee is made redeemable, on payment of 300*l.* and intereſt, upon any *Michaelmas-day*. Mortgagor dies, having deviſed his perſonal eſtate to his wife; there being no covenant for payment of the mortgage money, whether the perſonal eſtate in the wife's hands ſhall be liable?

ONE *Davids* made a mortgage of lands in *Wales*, by way of leaſe and releaſe, to one *Reynolds*, and his heirs, in conſideration of 300*l.*; and the proviſo was, that if *Davids*, or his heirs or aſſigns, ſhould, on *Michaelmas-day*, 1702, or any *Michaelmas-day* following, pay to *Reynolds*, his heirs or aſſigns, the ſum of 300*l.* and all arrears of rent or intereſt which ſhould be then due, then the ſaid conveyance was to ceaſe; but in this conveyance was no covenant for payment of the money as uſual, but only a covenant for quiet enjoyment, and that the eſtate was free from incumbrances. *Davids* pays the intereſt of this money during his life, and ſettles the lands themſelves to the uſe of himſelf for life; remainder to *Mary*, his intended wife, for life, for her jointure; remainder to his own right heirs; and after having iſſue by his wife one only daughter, named *Maud*, he by his will gives ſeveral legacies, and after deviſes in theſe words: *All the reſt and reſidue of my perſonal eſtate I give and deviſe to my wife Mary, and my daughter Maud, whom I alſo make joint executors, as well to pay my debts, as to levy my debts*; and dies. *Maud* the daughter was then an infant, and died ſoon after, under age, and without iſſue.

This bill was brought by the plaintiff, and his wife, who was heir at law to *Davids*, againſt *Mary* his widow and executrix, and againſt the aſſignee of the mortgage, *to be let into a redemption of the eſtate*; and that the perſonal eſtate, in the hands of the widow and executrix, might *be applied in the eaſe and exoneration of the real eſtate, for the benefit of the widow and heir at law.*

But my Lord Chancellor thought this a quite different caſe from thoſe wherein ſuch directions have been given; and ſaid, *Secus*, 2 Atk. 496.

that *there being no covenant for payment of money*, there was
424 no contract at all between * them, neither expreſs nor implied, nor would any action lie againſt the mortgagor, to ſubject his perſon, or compel him to pay this money; but this was in nature of a conditional purchaſe, ſubject to be defeated on payment by the mortgagor, or his heirs, of the ſums ſtipulated between them at any *Michaelmas-day*, at the election of the mortgagor, or his heirs; ſo that here was an everlaſting ſubſiſting right of redemption, deſcendable to the heirs of the mortgagor, which could not be forfeited at law like other mortgages, and therefore there could be no equity of redemption, or any occaſion for the aſſiſtance of this court, but the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it, which were not limited to any particular time, but might be performed on any *Michaelmas-day* to the end of the world; and ſince here was no covenant or contract, either expreſs or implied, to charge the perſonal eſtate of the mortgagor, he thought there was no reaſon to lay the load of this debt upon that which was given to other perſons; and although *Maud*, who was joint-executrix with the defendant, was alſo heir at law to the mortgagor, yet he did not think her moiety of the perſonal eſtate ought to be applied towards diſcumbering this eſtate, but muſt go to the defendant as the ſurviving reſiduary legatee; and for the expreſſion in the will concerning the payment of his debts, that being coupled with the other words, *whom I make joint-executors, as well to pay my debts, as to levy my debts*, ſhews that he meant ſuch debts as belonged to the office of an executor, which this did not, there being no remedy againſt them, for want of a covenant for that purpoſe, and it was at the election of the heirs of the mortgagor for ever, whether they would redeem this eſtate or not; but he agreed, if a redemption were now to be of it, the defendant having the eſtate in jointure for her life, muſt pay one third, and the plaintiff, the heir at law, the other two thirds of the principal mo-
425 ney, and that in the mean time the * defendant muſt keep down the intereſt of it: but there being ſome other points in the caſe, which required a further diſcuſſion, and might be properly triable

triable at law, my Lord made no decree, but ordered them to ſearch for precedents. ‡ *Note*; It was ſaid to be a common practice in *Wales* to make mortgages in this manner, with deſign to keep the eſtate for ever in their own family †.

‡ Vid. 2 Atk. 363.

White *verſus* Thornborough & al'. Caſe 283.

Antè, 276. 2 Vern. 702. and Gilb. Eq. Rep. 107. S. C. 1 Eq. abr. 265, pl. 3. 2 Eq. abr. 714, pl. 2. Gilb. Chan. 250.

Where a court of equity will carry marriage articles into execution, though to the defeating of credit rs.

Isaac Jackſon, the plaintiff *Mary*'s father, being ſeiſed in fee of a freehold eſtate, and alſo of a copyhold eſtate, and having married an orphan of the city of *London*, does, after marriage, (in conſideration of 1700*l.* which was her portion, and was but then paid him, by indenture the 1ſt of *October*, 1678) covenant with the Chamberlain of *London*, and another perſon, to levy a fine of the freehold eſtate, to the uſe of himſelf for life; remainder to the uſe of *Mary* his wife for life, for her jointure; remainder to the heirs male of his body, on the body of the ſaid *Mary* to be begotten, with remainder to his own right heirs; and by the ſame indenture covenants to ſurrender the copyhold eſtate to the ſame uſes: the copyhold was not ſurrendered, nor was any fine ever levied of the freehold. After this he had iſſue by his ſaid wife, *Abraham* his only ſon, and *Mary* his only daughter, the wife of the now plaintiff, and died. After his death, *Mary* his widow brought a bill, and had a decree to hold and enjoy the eſtate during her life. *Abraham* her ſon contracted debts to the value of 1400*l.* for which the defendants became his ſureties; and for the better ſecuring the payment of thoſe debts, *Abraham* does, by indenture, in *Auguſt*, 1714, covenant to levy a fine of his freehold eſtate, to the uſe of *Mary* his mother, who was then living, for life; remainder to the defendants for 500 years; remainder to himſelf in fee; and the truſt of the term was declared to be for payment of the 1400*l.* and intereſt, * with a covenant for further aſſurance; and at the ſame time *Abraham* ſurrenders his copyholdlands to the ſame uſes: after this, *Abraham* makes his will, and thereby deviſes all his freehold and copyhold lands to the defendants, for

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† On the equity reſerved after the trial of an iſſue directed by the court, his Lordſhip decreed in favour of the heir. 1 Wms. 294. (n.) and Poſt, 477.

the better indemnifying them againſt the ſaid 1400 *l.* and intereſt, and makes them executors, and then goes a voyage into the *Eaſt-Indies*, where he died without iſſue, leaving the defendant *Anne* his widow and relict. No fine was ever levied by him of the freehold eſtate purſuant to the ſaid indenture; and *Mary*, the plaintiff's mother, being dead, the plaintiffs brought this bill for a diſcovery of writings, and an account of the rents and profits of the real eſtate, as belonging to the plaintiff *Mary*; and that the defendants might likewiſe be obliged to ſurrender back the copyhold eſtate, as belonging to the plaintiff.

My Lord Chancellor *Harcourt* decreed accordingly, ſaving only the defendant *Anne*'s dower out of the freehold eſtate; and the reaſon of his decree was, that he took the firſt indenture to be only in the nature of articles for a ſettlement; and that if a bill had been brought to have carried it into execution, the ſettlement would have been ſo as to have made both the ſon and daughter *purchaſers of the reſpective remainders*; and as to the copyhold, that being to be entailed by the articles, could not afterwards, by a bare ſurrender, be defeated, without a particular cuſtom had been found to have warranted it. From this decree the defendants now appealed.

For the plaintiffs it was argued, that they were purchaſers under the firſt ſettlement made by the father, in conſideration of 1700 *l.* portion paid; † that though this deed was executed after marriage, yet the portion being paid at the ſame time, it could not be looked upon to be voluntary, but would be as effectual as a ſettlement made before marriage, and ſo it has always been held where the portion was paid at the time of making the ſettlement; that if the fine had been levied purſuant to this deed * of covenant, there had been no queſtion but it had been an effectual ſettlement, and then *Abraham* the ſon being tenant in tail, his covenants to levy a fine could not have bound his iſſue, much leſs the plaintiff *Mary*, who claimed as a purchaſer, by way of remainder, as heir of the body of her father; that though no fine were levied, yet in a court of equity it was to be

† 2 Vezey, 18. 308.

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looked on as the ſame thing, and there is no doubt but if a bill had been brought by the truſtees, in the father's life-time, this court would have obliged him to compleat the ſettlement by levying the fine; that the plaintiff *Mary* was a purchaſer for a valuable conſideration under this ſettlement, and therefore ought not to loſe the benefit of it; that as to the copyhold, that was actually ſurrendered to the uſes of the firſt deed, and then *Abraham* being tenant in tail thereof, could not, without a particular cuſtom for that purpoſe, defeat either his iſſue, or the plaintiff, by a bare ſurrender; and therefore it was prayed that the former decree might ſtand.

On the other ſide it was argued, that the defendants were juſt creditors for 1400*l.*; that if the eſtate were taken from them, they muſt entirely loſe their debts; that no fine being levied purſuant to the firſt deed, the legal eſtate continued ſtill in the father, and from him deſcended to *Abraham* his ſon, and he had by his will deviſed it to the defendants; that it was very extraordinary for the plaintiffs to aſk the aſſiſtance of a court of equity to take it from them; that *Abraham* the ſon was but tenant in tail in equity, and therefore, though he did not levy a fine, yet that was not material, for a bargain and ſale, a feoffment, or covenant, to levy a fine by ſuch an equitable tenant in tail, has been held ſufficient to bind his iſſue, and ſo it was ſettled in the caſe of *Allee* and *Allee*, where that point came ſolemnly in debate; that though the plaintiff claimed by way of remainder, as heir of the body of her father, yet it was ſuch a remainder as was actually veſted in the ſon, and if the ſettlement had been perfected, he might by * his fine have barred not only his own iſſue, but alſo 428
the plaintiff, and then his covenant to levy a fine ought in equity to have the ſame effect; that as to the copyhold eſtate, there could be no doubt but that was effectually veſted in the defendants; that there could be no entail of a copyhold, or if there could, yet a bare ſurrender by ſuch copyholder has been always held ſufficient to bind his iſſue, unleſs ſome particular cuſtom were found; that a common recovery was needful; and therefore it was prayed that the decree might be reverſed.

† Vid. 1 Wms. 622.

But my Lord Chancellor ſaid, he thought, † if this deed of covenant were to be looked upon only in the nature of articles, then if a bill had been brought to have carried it into execution in the life-time of the father, the court would have decreed the limitation to have been to the firſt ſon, and the heirs male of his body, with remainders to the daughters, and the heirs of their bodies begotten, the remainder to the heir of the body of the father; and in ſuch caſe, though the ſon, by a common recovery, might have barred the remainder to the daughters, yet they would have a chance for it, in caſe no ſuch recovery had been; which ſhews the reaſonableneſs of purſuing ſtrictly the intent of ſuch agreements, for the tenant in tail, through ignorance or forgetfulneſs, may omit to ſuffer ſuch recovery, or he may be prevented by death before he has compleated it, and then the remainder will take place; but he thought in this caſe, from the circumſtances of paying the portion at the ſame time, and the Chamberlain of *London* being a party, that it was more than articles, and ought to be looked on as a ſettlement, though he ſaid it was a very infirm and imperfect one; but taking it as a ſettlement, then by the limitations thereof, as they now ſtand, though the ſon would have had both eſtates in him, and might by a fine have barred them, yet his covenant to levy a fine only cannot affect the plaintiff, who now derives her title, not under
429 the ſon, but as heir of the body of * her father, *per formam doni*, and is in paramount the eſtate in tail male, which the ſon took.

But as to the copyhold eſtate, he ſaid, that could not be looked upon as a fee ſimple conditional (which the counſel for the plaintiffs contended for, not being able to ſupport it as an entail) and that the ſon could not alien it before the condition performed by having of iſſue; for that every body knew copyholds were at firſt but a kind of tenure in villanage, and, in reſpect of their baſe nature, determinable at the will of the Lord, though now indeed they have been improved and hardened by time; but,

† 2 Vern. 585. 705. 1 Atk. 474.

prima facie, it muſt be taken, † *that a ſurrender by ſuch tenant in tail will bind his iſſue, unleſs a particular cuſtom were found; that there ought to have been a common recovery*, and that not appearing in the

the caſe, he thought the defendant had a good title to the copyholds; and *therefore reverſed the former decree as to that, but affirmed it as to the freehold.*

But *note*, ſeveral at the bar were diſſatisfied with this and the former decree as to the freehold, and thought that the defendants having the eſtate in law in them by the deviſe, and being juſt creditors, ought not to have had this eſtate taken from them by the aſſiſtance of a court of equity, and thought the diſtinction of an infirm ſettlement unintelligible.

Note likewiſe, in this caſe the defendants themſelves had, by their anſwer, plainly confeſſed, that they had notice of the firſt deed at the time they became ſureties, and took the ſon's covenant to levy the fine.

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Termino S. Hillarii,

1715.

In Curia Cancellariæ.

Caſe 283.

Trott *verſus* Vernon.

Antè, 264. 1 Eq. abr. 198, pl. 6. S. C. 2 Vernon, 708. S. C. Gilb. Eq. Rep. 111. S. C. Gilb. Chan. 332. S. C. 1 Vern. 45. 457. 2 Vern. 690. 3 Wms. 91. 358. Caſes temp. Talb. 110. 2 Vezey, 271. 569. 4 Brown's Parl. Caſes, 90.

In court Lord *Cowper*.

A. deviſes in theſe words; *Imprimis, I will and deviſe, that all my debts, legacies, and funerals, ſhall be paid and ſatisfied in the firſt place:* theſe words amount to a charge on the real eſtate, if the perſonal eſtate is not ſufficient for that purpoſe.

A Man being ſeiſed of a real eſtate, and alſo poſſeſſed of ſome perſonal eſtate, makes his will in writing, and thereby deviſes in theſe words; *Imprimis, I will and deviſe that all my debts, legacies, and funerals, ſhall be paid and ſatisfied in the firſt place. Item, I give and deviſe*—and then proceeds to diſpoſe of his real and perſonal eſtate; and his perſonal eſtate not being ſufficient, the queſtion was, Whether that clauſe in his will ſhould amount to a charge on his real eſtate for the payment of his debts, legacies, and funeral?

My Lord Chancellor was clear of opinion that it ſhould; for as to his debts, it was but natural juſtice they ſhould be paid, and his perſonal eſtate would have been liable to the payment thereof, whether he had given any directions in his will about them or not; when therefore he wills and deviſes, that his debts, legacies, and funeral expences, ſhall be paid and ſatisfied, in the

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firſt place, theſe words muſt be intended to give a preference for thoſe purpoſes to any other whatſoever; and ſince he * does not deviſe his real or perſonal eſtate to any perſon in particular for theſe purpoſes, the perſons who come within that deſcription muſt be ſuppoſed to be within his view, and it muſt be taken as a deviſe for their benefit, preferable to any diſpoſition whatſoever either of his real or perſonal eſtate, and conſequently both of them are made liable thereto. 431

Pagett *verſus* Hoſkins.

Caſe 284.

Antè, 255. Gilb. Chan. 335. S. C. Gilb. Eq. Rep. 111. S. C. 1 Eq. abr. 60, pl. 2, 3, 4. 7. 1 Vernon, 309. 2 Vernon, 61. 118. Caſes temp. Talb. 173. and 3 Wms. 409. 1 Atk. 464. S. C. cited. Vid. infrà, 434.

A freeman of *London* having iſſue two daughters, deviſes 6000 *l.* apiece to them, and makes his wife executrix; by an eſtimate it appeared that his perſonal eſtate, at his death, was 18000 *l.* to 6000 *l.* of which the widow being entitled, *A.* her ſecond huſband, in conſideration thereof, ſettled a jointure of 600 *l. per ann.* Afterwards a loſs of 12000 *l.* befel the freeman's eſtate; and though the wife was dead, and it was urged that the ſecond huſband was a purchaſer of her fortune, yet decreed, that the daughters ſhould have a proportionable recompence out of the 6000 *l.*

Peter Whitcombe being a freeman of *London*, and having iſſue two daughters only by a former venter, makes his will, and thereby deviſes 6000 *l.* apiece to his ſaid two daughters, and makes his ſecond wife executrix, and dies; the widow, after his death, proves his will; and on a treaty of marriage, to be had between her and Sir *Bennet Hoſkins*, ſhe gives in an eſtimate of Mr. *Whitcombe*'s perſonal eſtate, amounting to about 18000 *l.* whereof 6000 *l.* being her own ſhare, ſhe had taken tallies and orders to that value into her own hands, and propoſes to have a ſettlement made on her by Sir *Bennet* adequate to that fortune.

Thereupon by articles, reciting a marriage intended to be had between her and Sir *Bennet Hoſkins*, and that it was computed her fortune upon the account would come out to be 6000 *l.* Sir *Bennet*, in conſideration thereof, agrees to ſettle upon her, by way of jointure, 600 *l. per ann.* for life; and ſhe, at the ſame time, makes an aſſignment of the dower ſhe was entitled to out of Mr. *Whitcombe*'s real eſtate to truſtees, in truſt, to make good to Sir *Bennet* any loſs or deficiency that might happen to the leſſening of her 6000 *l.* fortune.

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The marriage takes effect, and Sir *Bennet* receiving the
432 6000 *l.* ſettles 600 *l. per ann.* on his wife for life, * purſuant to the articles; and it happening afterwards, that a loſs of 12000 *l.* really befel Mr. *Whitcombe*'s perſonal eſtate, this bill was now brought by the daughters, after the death of my Lady *Hoſkins*, and Sir *Bennet*, who ſurvived her, againſt the defendant, who had taken out letters of adminiſtration to Sir *Bennet* for an account of his perſonal eſtate, and to have a proportionable recompence thereout for their ſhares of the 6000 *l.* that now, as the caſe fell out, being all the perſonal eſtate Mr. *Whitcombe* had left; and it was decreed accordingly by my Lord *Harcourt* to a general account: but afterwards, on a rehearing, his Lordſhip varied that decree, and directed an account of the perſonal eſtate (excluſive of the 6000 *l.*); from which decree the plaintiffs now appealing to my Lord Chancellor *Cowper*,

It was inſiſted upon for the plaintiffs, that they ought to have an account of the perſonal eſtate at large; that if they ſhould not have this account, they would be entirely defeated of their portions; that this 6000 *l.* was all that was left, and Sir *Bennet* having notice that it was ſubject to an account, ought to be affected with it, eſpecially as this caſe is, where he has provided himſelf with a recompence, in caſe of any loſs or deficiency; that otherwiſe it would be in the power of any woman, who was an executrix, to give away all her teſtator's aſſets with herſelf in marriage, and ſo defeat truſt creditors of their debts, the conſequence whereof would be, that none from henceforth would run that hazard, and ſo no women would be made executors; that though Sir *Bennet* is in the nature of a purchaſer of this 6000 *l.* by his ſettlement, yet he appears to be a purchaſer with full notice, and therefore his aſſets ought to
Vid. 2 Vern. 516. be liable to the plaintiff's ſatisfaction, and cited † 2 *Vent.* 360. *Hodges* and *Waddington*.

On the other ſide, it was argued by Mr. *Vernon*, and others, that if an executrix commits a devaſtavit, and marries, the huſ-
433 band ſhall be liable, even at law, during * the coverture, to make it good, but after her death no ſuit can be maintained againſt him at law, whatever fortune he had with her; that in equity indeed

indeed it has been held, that any ſpecific aſſets of the wife's teſtator may be followed in the hands of the huſband after her death, ſo for any thing which he has merely in right of his wife he ſhall be liable in this court, ſo far as that extends to make good any devaſtavit committed by his wife before marriage, but for the fortune at large of the wife, it was never yet carried ſo far as to charge the huſband on account thereof after her death, eſpecially where the huſband, as in this caſe, was a purchaſer of his wife's fortune for a valuable conſideration, by making a ſettlement on her; that if the wife before marriage had ſold theſe tallies and orders to any ſtranger, and waſted the money, the plaintiffs could never have come againſt the purchaſer for a recompence; that the huſband was equally a purchaſer in this caſe, and ought not to be affected by this accidental loſs, which has ſince happened in Mr. *Whitcombe*'s aſſets; that if it were otherwiſe, there would be no dealing with an executor, and where a woman was made executrix, ſhe muſt never expect to marry.

But my Lord Chancellor ſaid, that Sir *Bennet Hoſkins taking notice* in the very articles, that this very 6000 *l.* was part of her firſt huſband's perſonal eſtate, and that too upon an account open and unliquidated, he comes in as a purchaſer thereof, ſubject and liable to that account, and can be entitled to it no otherwiſe; he does not take it as a ſtated liquidated ſum, whereto his wife was entitled, but as ſo much as upon the account might be coming to her; and therefore takes it ſubject to the event of that account, and has accordingly provided himſelf of a recompence, in caſe it ſhould fall out to be leſs; and therefore he thought, that the ſecond decree, which excluded the 6000 *l.* out of the account, was wrong, and that the firſt decree was right, and ought to ſtand.

†* But Mr. *Vernon* ſeemed to be much diſſatisfied with this decree, and apprehended the conſequence of it might be very dangerous to perſons who ſhould deal with executors for the pur- 434

† In *Mead* v. *Lord Orrery* (3 Atk. 240.) Lord *Hardwicke* alludes to the above caſe of *Pagett* v. *Hoſkins*, obſerving, "*I ſee no grounds for Mr. Vernon's diſſatisfaction at the decree in that caſe.*"

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chaſe of their teſtator's aſſets; but my Lord Chancellor ſaid, that inference could not be made from this decree, which was founded wholly on the circumſtances of the caſe.

Gilb. Chan. 319. 18 Viner (*Purchaſor*) 121, pl. 11. and Barnardiſton, 81. 2 Vern. 444. 616. Eq. abr. 358, pl. 4. 2 Wms. 148. 151.—Vid. *Nugent* v. *Gifford*, 1 Atk. 463.

Note; A caſe was cited, when this Chancellor had the ſeal before, where an executor being poſſeſſed of a term for years in right of his teſtator, and being indebted to one in a ſum of money on his own account, agreed with his creditor for the ſale of this term, and that the debt ſhould be diſcounted out of the purchaſe-money; and yet, upon a bill brought againſt him by the creditors of the teſtator, he was not allowed to ſink his own debt, but was decreed to pay the money, becauſe he purchaſed with full notice; that this was a teſtamentary eſtate, and nothing came into the executor's hands as an equivalent for it, to make up the *quantum* of the teſtator's aſſets.

Termino S. Trinitatis, 1716.

In Curia Cancellariæ.

Stanhope *verſus* Thacker. Caſe 285.

Antè, 338. S. P.

Gilbert Thacker, the father of *Gilbert Thacker* his ſon, on the marriage of the ſon, by indentures of leaſe and releaſe, in the year 1670, conveyed certain lands to truſtees and their heirs, to the uſe of *Gilbert* the father for life; then to *Jane* his wife for life; remainder to *Gilbert* the ſon for 99 years, if he ſhould ſo long live; remainder to truſtees and their heirs, during his life, to ſupport contingent remainders; remainder to the intended wife for life, for her jointure; remainder to the firſt and other ſons of that marriage, in tail male ſucceſſively; remainder to the daughter and daughters of that marriage, and the heirs of their bodies, till they ſhall, out of the rents, iſſues, and profits of the ſaid premiſſes, have raiſed and received the ſum of 3000*l.*; and after the ſaid ſum raiſed, or in caſe there be

Father and ſon, on the ſon's marriage, by leaſe and releaſe, convey lands to truſtees and their heirs, to the uſe of the father for life; remainder to his wife for life; remainder to the ſon for 99 years, if he ſhould ſo long live; remainder to truſtees during his life, to ſupport contingent remainders; remainder to the ſon's intended

wife for life, for her jointure; remainder to the firſt and every other ſon of that marriage, in tail male; remainder to the daughter or daughters of that marriage, and the heirs of their bodies, till they ſhall, out of the rents, iſſues, and profits, have received 3000*l.*; remainder to the heirs of the body of the ſon; remainder to the ſecond ſon of the father, and to his firſt and other ſons; remainder to the right heirs of the ſon, for ever. There were iſſue of the marriage only two daughters, who being in poſſeſſion after all the particular precedent eſtates determined, ſuffer a common recovery; and it was held, that this was no bar of the ſubſequent remainders, the limitation to them being only a ſecurity till the 3000*l.* was raiſed.

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436 no ſuch daughter or daughters, then to the heirs of the body of *Gilbert* the ſon; remainder to *Francis* * *Thacker*, the ſecond ſon of old *Gilbert*, and to his firſt and other ſons, in tail male ſucceſſively; and ſo in like manner to *John Thacker*, a third ſon of old *Gilbert*, and to his firſt and other ſons, in tail male ſucceſſively; remainder to the right heirs of *Gilbert Thacker* the ſon, for ever.

The marriage takes effect, and they have iſſue only two daughters, who being in poſſeſſion after all the other eſtates determined which were precedent, ſuffer a common recovery to the uſe of themſelves and their heirs; and one queſtion in this caſe was, Whether by this recovery the remainders were not barred?

And it was argued that they were, becauſe the primary intention of this limitation was to make them tenants in tail, and the raiſing of the 3000 *l.* was but the ſecondary intention thereof; and when they, being ſo tenants in tail, ſuffer a common recovery, this bars their eſtate tail, and the remainders depending thereon; and for this was cited and relied on a caſe in point, *Benſon* and *Hudſon*, 1 *Mod.* 108 to 112, and the ſeveral caſes there put by my Lord Chief Juſtice *Hale*.

But as to this point, my Lord Chancellor was clear of opinion, both upon the firſt ſpeaking of it, and the next day after, that this was but in the nature of a ſecurity for the 3000 *l.*; and though the recovery barred the eſtate tail and remainders at law, yet the daughters were but in the nature of truſtees, after the 3000 *l.* raiſed, for thoſe in remainder; that before the recovery, they had but an eſtate tail for their ſecurity for that ſum; that now, after the recovery, they had the fee ſimple, but ſtill the ſame in a court of equity was but a ſecurity till that money raiſed; that thoſe in the remainder had the equity of redemption in the ſame manner as the perſon who made that ſecurity would have had if no ſuch limitation in remainder had been; that therefore they might, at any time, by paying off that 3000 *l.* determine the eſtate of the daughters, and then the daughters would be but truſtees for them; that

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* this 3000*l.* being to be raiſed out of the rents, iſſues, and profits, if the ordinary or annual rents and profits of the lands would not raiſe the money in a convenient time to anſwer the intent of the ſettlement, which was to provide portions for the daughters; ‡ that in a court of equity the ſame might be decreed to be raiſed by a ſale or mortgage thereof, which were the extraordinary profits of the ſame lands; and though in this caſe the daughters had been in poſſeſſion of thoſe lands for ſome time, and received the rents and profits thereof, yet they might ſtill ſupply any deficiency in the raiſing of theſe portions by mortgage or ſale, and the rents and profits already received ſhould be applied, in the firſt place, towards the intereſt of the 3000*l.* and the reſidue received towards the principal, and what ſhould fall ſhort to be made up by a ſale or mortgage; otherwiſe, if they ſhould be confined to raiſe the 3000*l.* out of the annual rents and profits only, they would be eating out their portions, and might never have any ſum adequate to the proviſion intended to them. 437 ‡ 1 Wms. 415.

Another point in this caſe was, whether the remainder to the heirs of the body of *Gilbert* the ſon, and the laſt remainder to the right heirs of the ſaid *Gilbert*, ſhould veſt in ſuch heirs of the body, or right heirs by purchaſe; for it ſeems the two other ſons of old *Gilbert* were dead, without iſſue.

And it was argued it ſhould, becauſe *Gilbert* the ſon taking but an eſtate for years, and the remainder being limited expreſsly to truſtees and their heirs, during his life, that the remainder muſt veſt in the heirs, or heirs of his body, by purchaſe, he having no eſtate of freehold.

But on the other ſide it was argued, that the ſon joined with his father, and therefore it was to be preſumed that the father had but an eſtate for life, and that the inheritance moved from the ſon, and then it was his old reverſion in him; and upon this occaſion were cited the caſes of † *Fenwick* and *Mitford*, 2 *Co.* 91. * *Co. Lit.* 22 *b.* and *Pibus* and *Mitford*, 1 *Mod.* 98.; that a man cannot make his heirs, or heirs of his body, purchaſers, without departing with the whole fee-ſimple; that here he had † Fearne's Cont. Rem. 42. S. C. 438

not ſo done, becauſe having but an eſtate for years, the old eſtate for life continued in him, and being coupled with the remainder to the heirs of his body, and that to his right heirs, muſt neceſſarily derive the eſtate to them by deſcent.

But to this it was replied, that the eſtate being limited to truſtees during his life, entirely varied this caſe from thoſe which had been cited; that this ſort of limitation was not thought of at the time of thoſe other caſes, but was entirely new, and found out long after; that by reaſon thereof he could not be ſaid to have any reſulting or old uſe during his life; and that it had been ſo adjudged in the caſe of † *Tippin* and *Coſuns*, by my Lord Chief Juſtice *Holt*, and all the court, which caſe is reported in *Mod.* 380. though the judgment is not there mentioned.

† Fearne's Cont. Rem. 34. S. C.

But this being merely a point of law, and it not appearing whether *Gilbert* the ſon had any, or what eſtate, though he joined in the conveyance, whether an eſtate tail with a reverſion to old *Gilbert* in fee, or whether he had a remainder in fee, or what other eſtate,

My Lord Chancellor ordered an ejectment to be brought, and on a ſpecial finding of this matter, the queſtion to be argued and determined at law; and ſaid, that he thought it a very nice point.

Note; The very ſame point came in queſtion before my Lord Chancellor *Harcourt*, in the caſe of ‡ *Ewer* and *Howard*, but was not determined.

‡ Antè, 338.— Vid. 2 Eq. abr. 700, c. 1.

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Termino S. Mich.

1716.

In Curia Cancellariæ.

Sympſon *verſus* Hornſby.

Caſe 286.

THE queſtion in this caſe aroſe upon the will of one *Thomas Addiſon*, who having a wife, and only two daughters, deviſed lands in ſeveral towns to his wife for life, for her jointure; and afterwards, towards the cloſe of his will, deviſes all his lands, tenements, and hereditaments, in thoſe towns, after the death of his dear wife, to his daughter *Bridget*, and the heirs males of her body; and for want of ſuch iſſue, to his daughter *Jane*, (who was his eldeſt, but had diſobliged him by marrying improvidently) and her aſſigns, during her natural life; and after her death, to her firſt and other ſons, in tail male ſucceſſively, with ſeveral remainders over. *Bridget* dies in her father's life-time, leaving iſſue a ſon, whom the grandfather took to his own houſe, and expreſſed much kindneſs for: afterwards the grandfather makes a codicil, which began thus, *A codicil to be annexed to my will*; and by that he gives ſome part of a leaſehold eſtate (which by his will was given to his daughter *Bridget*) to her ſon, adds another truſtee for ſome charities

1 Eq. abr. 216, pl. 6. S. C. 407, pl. 6. 2 Vern. 722. S. C. Gilb. Eq. Rep. 115. 120. S. C. and P.

440 he had given by his will, and then duly * executed this codicil; but the codicil was not actually annexed to his will, ſo that the execution of that could not amount to a republication of his will; and now the queſtions were,

1ſt, Whether the wife took an eſtate for life in the lands remaining undiſpoſed of by implication? *2dly*, Whether the ſon of *Bridget* could take at all?

Antè 381, 382. An heir at law cannot be diſinherited but by a ſtrong and neceſſary implication.

As to the firſt point, the court ſeemed pretty clear that the wife took no eſtate for life by implication, becauſe the implication which ſhall diſinherit an heir at law muſt be neceſſary; and here was no neceſſary implication, though the daughters were heirs, becauſe it may be intended to extend only to thoſe lands which were before expreſsly deviſed to the wife for life, that they ſhould not have them till after her death; but for the others, they ſhould go to them immediately, and therefore the will ſhall be taken diſtributively, according to the caſe of *Cock* and *Gerrard*, 1 *Saund.* 180. 1 *Lev.* 212.

† Plowden, 345. 1 Eq. abr. 215, pl. 1. S. C. 1 Wms. 397. Fearne's Cont. Rem. 124.—Vid. 2 Wms. 2. and 259. Vid. Poſt, 453. in marg.

Deviſe of lands to *A.* and the heirs male of his body. *A.* dies in the life-time of the teſtator, leaving iſſue; the deviſe is void, and the iſſue cannot take.

‡ 2 Eq. abr. 768. S. C. (n.) Comyns, 384. S. C. cited. 10 Mod. 93.

As to the ſecond point, it was argued, that the ſon of *Bridget* could take nothing in this caſe; that, as in † *Brett* and *Rigden*'s caſe, the word heirs was only to denote the quantity of the eſtate, ſo in this caſe the words heirs males of her body were only to expreſs the quantity likewiſe, that is, in the one caſe the deviſee was intended to take a fee-ſimple, ſo in this caſe the deviſee was intended to take a fee-tail, and in neither caſe were the word heirs, or heirs males of the body, any deſcription or deſignation of the perſon who was to take by purchaſe; that in caſe of ſuch a deviſe in fee the firſt taker might immediately diſpoſe of and give it away from his heirs, ſo might the deviſee in this caſe too by proper conveyances; that this point has been ſettled long ſince in *Hartopp*'s caſe, in *Cro. Eliz.* 243.; that this was held clear likewiſe in my ‡ *Lord Lanſdown*'s caſe, lately, in the *King's-Bench*, where my Lord of *Bath* deviſed lands to *Bernard Granville*, and the heirs males of his body, and *Bernard* dying in the life-time of the * teſtator, leaving iſſue male, the teſtator, my Lord of *Bath*, afterwards made a codicil, and the will

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and codicil both lying together upon the table, my Lord took up the codicil, and ſaid, this was his will, and then publiſhed and executed it in the preſence of three witneſſes, and when he had done, put both the will and codicil together in a box, and yet in that caſe it was held, that this making of the codicil was no republication of the will, being not affixed together, and then the heirs males of the body of *Bernard Granville* could not take, no more can they in this caſe; that admitting the making ſuch codicil might amount to a republication of the will, yet whilſt the words of the will continued as they were, the heirs male of the body could not take, no more than a grandſon could take, as ſon, by ſuch republication, according to the caſe of *Steed* and *Berries*, 1 *Vent.* 341. 2 *Mod.* 313.; that a codicil was a diſtinct inſtrument of itſelf, and if the making of that ſhould amount to a republication of the will, it would entirely elude the Statute of Frauds and Perjuries; that in Lord *Lanſdown*'s caſe, indeed, upon the importunity of great counſel, a ſpecial verdict was directed to be found, though the court were clear of their opinion as to the point, and that caſe was afterwards agreed by the parties; that in 1 *Sid.* 53. 78-9. a like deviſe to four daughters was held void for a fourth part, by the death of one of the daughters in the life-time of the teſtator; and ſo was likewiſe the caſe of ‡ *Popham* and *Bamfield* in this court.

‡ 1 Wms. 54. and 2 Eq. abr. 308, c. 11, 12. S. C.

‖ 2 Vern. 209. 625. 1 Vezey, 485. 2 Vezey, 626.—*è contrà*, 1 Rolls Abr. 618. Cro. El. 493. Comyns, 381. 1 Vezey, 442. 492. 3 Atk. 180, 181. Bacon's Abr. vol. 5. (tit. Wills, 311 to 513.) Douglas, 716. N. 2. 3 Brown's Parl. Caſes, 107. Cowper, 158.

My Lord Chancellor was clear of opinion, that the codicil in this caſe could not help them; but he ſaid the conſtruction of law in thoſe caſes was extremely rigid and ſevere; that the teſtator in this caſe moſt certainly meant, that *Jane* ſhould have nothing whilſt there remained any iſſue male of *Bridget*; that he would conſider of the will, and if any thing could be found to diſtinguiſh this caſe from thoſe which have been cited, he would give relief for a moiety; but if not, * the caſes were too ſtrong, and he muſt ſubmit to be bound by them; and afterwards gave his decree accordingly, which *vid. inf.* 452.

‖ Making a codicil, and annexing it to the will, no republication of the will.

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Caſe 287.

† Brown *verſus* Barkham.

Poſt, 589. 1 Coke's Inſt. Harg. ed. 24 b. 26 b. 164 a. John de Mandeville's Caſe, ibid. 26 b. 1 Eq. abr. 215, pl. 14. S. C. 2 Vern. 729. S. C. Gilb. Eq. Rep. 116, and 131. 1 Wms. 652. S. C. and N. 2 Wms. 1. 1 Str. 35. S. C. 8 Vin. 317. (tit. Deviſe). 14 Viner, (tit. Heir) 254 to 257. Fearne's Cont. Rem. 109. 146. 5 Burrows, 2615. 2 Blackſtone's Rep. 687.

A. deviſes lands in truſt, after debts paid, to convey the premiſſes to the heirs male of the body of *B.* the teſtator's great grandfather. *C.* is the heir male of the body of *B.* but not heir general, there being a daughter of an elder brother, who is heir general. Whether the truſtees are to convey to *C.*; as *C.* would be well entitled to take as heir male by deſcent, ſo he is ſufficiently deſcribed to take by purchaſe.

SIR *Edward Barkham* being ſeiſed in fee of the lands in queſtion, by his will, dated the 19th of *January*, 1700, deviſes all his eſtate to Sir *William Maſſingberd* and *Dymoke Walpole*, and their heirs, in truſt, to ſell the ſame, or ſo much as would be ſufficient to pay his debts and legacies; and after payment thereof, directed his ſaid truſtees to convey the reſidue of his eſtate to his couſin *Robert Barkham*, and the heirs males of his body; and for want of ſuch heirs males, to the heirs males of the body of Sir *Robert Barkham*, his great grandfather; and for want of ſuch heirs male, to his own right heirs for ever; and gave to his ſiſter, Mrs. *Newcomen*, 2000*l.* to be put out at intereſt by his truſtees during her life, and after her death to be paid to her eldeſt ſon; but if no ſon, then 1000*l.* was to go to her executors or adminiſtrators, and the other 1000*l.* to his ſaid couſin *Robert Barkham*, or his heirs male; and after ſome other legacies, gives all the reſidue of his perſonal eſtate to his ſecond ſon *Robert Barkham*, and made him ſole executor; but if it happened that the ſaid *Robert* was not in *England* at the time of his death, then he made the ſaid truſtees executors in truſt for him till he ſhould return; but in caſe the ſaid *Robert* ſhould die before he returned, then he made his heir male ſole executor, and gave him all his perſonal eſtate, and ſoon after died without iſſue. *Robert Barkham*, the couſin, died without iſſue in *Spain* before the teſtator; and now the queſtion aroſe upon this will, Whether *Edward Barkham*, who was heir male of the body of the great grandfather, or Mrs. *Newcomen*, who was

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ſiſter and heir of Sir *Edward Barkham* the * teſtator, and likewiſe heir general of the great grandfather, had the better title?

† Generally reported under the name of *Newcomen* v. *Barkham*. Vid. poſt, 461. and N.

It

It was argued by Sir *Thomas Powis*, that *Edward* being living, and no notice taken of him, it was plain the teſtator never intended he ſhould have it in the ſame manner with his brother *Robert*; that the 2000*l.* was only a recompence for the preſent deviſe of the eſtate tail to *Robert*, and not to be carried as a recompence throughout to the laſt remainder; that that was only to go to thoſe who fully came within that deſcription; that the word heirs is either to denote the perſon who is to take, and then it is *vice nominis*, or it is to expreſs the quantity of eſtate that is to paſs, and *Hob.* 31. he that will take as heir male by purchaſe, muſt not only be male, but heir too; and ſaid, the principal caſe of *Cownden* and *Clerk*, in *Hob.* 29, and *Mod.* 863. and the caſe of *Aſhenhurſt*, cited at the end of that caſe, were directly in point; that without all queſtion it was ſo in a limitation by deeds, and had always been held to be the ſame in wills; that in 1 *Co. Archer*'s caſe, it was held to be plainly a contingent remainder to the next heir male of *Robert Archer*, and not ſuch a deſcription of his perſon as to veſt it in him preſently, for then it could never have been deſtroyed by the feoffment of the father, and 2 *Leon.* 70. *Challoner* and *Bowyer*, comes up directly to our caſe, and ſhews, that the ſame conſtruction has prevailed in a will, as well as in a deed; that in the caſe of *Burchett* and *Durdant*, 1 *Vent.* 334. if it had not been for the words *now living*, it would have been a plain contingent remainder, and ſo the judges in that caſe agreed, and cited the caſe of † *Goodright* and *Corniſh*, 4 *Mod.* 255. to the ſame purpoſe; and that in the caſe of ‡ *Beaumont* and *Long*, the words begotten were held equivalent to the words now living, and amounted to a deſcription of the perſon; that there was a wide difference between the words, and for want of ſuch iſſue, and the words for want of his heirs male; that in the firſt caſe, the word iſſue was an explanation and * correction of the general import of the words heirs of the body, but in the laſt caſe the ſame words being ſtill uſed, none could claim who was not compleatly heir male by purchaſe; that in this caſe he ſeemed to have done with *Robert*'s family, when he had limited it to him and the

† 1 Lord Raymond, 3. 1 Salk. 226.

‡ 1 Wms. 229, and 368. Vid Fearne's Cont. Rem. 146.

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heirs male of his body, and that he intended it ſhould go as the law directed.

Lechmere to the ſame intent; that the 2000*l.* given to Mrs. *Newcomen*, could only be a recompence for the eſtate tail limited to *Robert*; that he only poſtponed his heirs for the ſake of *Robert*, and his iſſue male; and whenever they failed, his heirs muſt come in; that indeed, of late days, limitations of this kind have been carried much farther than in ancient times, but he thought they ought not to be carried any farther, for that would ſhake a great many ſettlements, and deſtroy the peace and quiet of many families; that the caſe of *Burchett* and *Durdant* was the firſt caſe that made any alteration in the conſtruction of deviſes of this kind, and ſaid, in *Mandevill*'s caſe, *Co. Litt.* 26 *b.* it was held quite otherwiſe; that there was a great deal of difference between a lineal heir male and a collateral heir male, and that no caſe had been carried ſo far as to let in a collateral heir male, unleſs he was compleatly ſuch; that in the caſe of ‡ *Burchett* and *Durdant*, the whole ſtreſs and foundation of the reſolution went upon the words *now living*, which they held to amount to the ſame as *heir apparent*, and yet that caſe was ſtrongly oppoſed, and underwent a very great litigation; that in the caſe of *Beaumont* and *Long*, the words *then begotten* were held of the ſame force as the words *now living* were in the other caſe, and that caſe went on, *and for want of ſuch iſſue*, which were plainly explanatory, and ſhewed, that the word heirs was meant the iſſue of his aunt *Long*; but here it is, *and for want of ſuch heirs male*, which ſtill preſerves the notion of a legal heir; and then to take by purchaſe, he muſt be both heir and male, which in this caſe he is not; that the * caſe of *Cownden* and *Clerk* had been always cited on theſe occaſions, and was never yet denied to be law; that my Lord *Hobart* in that caſe was clear of opinion, that the ſtatute *de Donis* was only to preſerve the deſcent to the heirs male of the body, not to direct their taking by way of purchaſe; that in *Co. Lit.* 26 *b.* 164 *a.* if a man has a ſon and a daughter, and the lands are given to the daughter, and the heirs

‡ Vid. 1 Wms. 229. 368. 2 Willon, 125, and 144.

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males

males of the body of the father, and the heirs females of the body of the father, ſhe takes only an eſtate for life, and the other limitation is void, becauſe ſhe ought to be both heir and female to take by purchaſe, which in that caſe ſhe is not, the brother being heir.

On the other ſide it was argued by Sir *Joſeph Jekyll*, that there could be no ſound reaſon aſſigned for the difference between the heir male taking by deſcent, and when he was to take by purchaſe; that at common law, before the ſtatute *de Donis*, ſuch limitations were taken notice of, and allowed to be good; that in a will, the intent of the teſtator, who was ſuppoſed to be *inops conſilii*, was always to be regarded; that in the caſe of † *Pybus* and *Mitford*, my Lord *Hale* was of opinion, that if the heir male by the ſecond *venter* could not have taken by deſcent, that he might take by purchaſe; that the caſe of *Beaumont* and *Long* was a caſe in point for them, though indeed this was a much ſtronger caſe, for there the perſonal legacies given to the heirs at law were given but once, but here the 2000 *l.* is limited to the heir, ſo as in ſome ſort to reſemble land, for it was to go to her eldeſt ſon, if any, and if not, then to her executors, *&c.*; that there was no difference between the limitation for want of ſuch iſſue, and for want of ſuch heirs; that in neither caſe could it be carried further than the words of limitation imported, and ſo it was held in *Dyer*, 171. *Frenſham's* caſe; that the words then begotten, in *Beaumont's* caſe, would be of no weight to direct that reſolution, for my Lord * *Coke* tells us, in his firſt inſtitute, 20, *procreatis* and *procreandis* are the ſame.

† 1 Vent. 372. Vid. Fearne's Cont. Rem. 30.

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Attorney General to the ſame intent; that if this had been an eſtate tail in Sir *Robert* the great grandfather, there could have been no doubt the defendant would have taken as heir male of his body; that in this caſe the intent of the teſtator was plain to exclude his heir general; that he had ſufficiently provided for her, by giving her 2000 *l.*; that the meaning of the books, which ſay, the word heir is not a good name of purchaſe, is no more than that it is not a ſufficient deſcription of the perſon who

who is to take, but if by any circumſtances he is ſo deſcribed as to notify who is meant, then it is a ſufficient name of purchaſe, and ſo is the opinion of my Lord *Anderſon*, in his report of † *Shelly*'s caſe; that the limitation to the heirs male of the body of one who was dead, was *quaſi* an eſtate tail in the dead perſon; that taking of it in that ſenſe would reconcile all the differences, and anſwer all the difficulties that had been objected againſt it; and that it was to be taken in this ſenſe, he cited 2 *Leon.* 23. 27. *Cro. Eliz.* 108-9. *Lit. ſect.* 30. *Cro. Car.* 24. *Hodkinſon* and *Wood*, 1 *Mod.* 226. and 2 *Mod.* 207. the caſe of *Southcote* and *Stowell*; that this differed from the caſe of *Cownden* and *Clerk*, for the heirs male were not limited or mentioned to be of his body as in this caſe; and ſaid, the caſe 16 *Eliz.* at the end of *Pybus* and *Mitford*, 12 *Vent.* was a caſe in point for them.

† 1 Co. 104.

Mr. *Cowper* to the ſame intent; he thought the diſtinction taken by Mr. Attorney General would reconcile all differences, and deſtroy all the fictions of the law againſt them; that it would take away all uncertainty in the deſcription of the perſon, and carry on the deſcent as the teſtator intended it; that if this notion of its being an eſtate tail in the great grandfather were but a fiction, yet it might well be made uſe of to deſtroy another fiction, which excluded the heir male from taking.

447 * Sir *Robert Raymond* to the ſame intent; that, generally ſpeaking, a limitation to the heirs males, or heirs females, of ſuch a one, will carry it only to thoſe who are compleatly ſuch; but where there are any words that will amount to a deſcription of the perſon, ſo as to ſhew whom he meant by thoſe words, there it will be ſufficient, though he be not heir male or female in a ſtrict legal conſtruction, eſpecially where the heirs general are excluded, as in this caſe. As to the objection, that the 2000*l.* was a recompence only for the loſs of the firſt eſtate tail, he ſaid, it muſt be taken as a recompence for the whole; for the defendant *Newcomen* could no more take under the limitation to the heirs male of the body of the great grandfather, than he could under the firſt limitation to *Robert* in tail; and

therefore the recompence muſt be ſuppoſed to extend to the whole; and cited a caſe of *Baker* and *Wall*, in *C. B. Paſch.* 4 *W. Rot.* 1484, that a perſon may take as ſpecial heir where the intent is manifeſt to exclude the heir general.

Mr. *Vernon* to the ſame intent; that the will of the teſtator was to be obſerved as far as it might be; that it was here in the caſe of a truſt which this court had the direction of; that they had ſometimes varied from the rules of law, and when they had ſo done, the courts of law, from the inconveniences that would otherwiſe follow, had come into the rules of the courts of equity, as in the ſettlements of terms for years beyond a perſon's life, and ſo they might in this caſe.

Mr. *Williams* on the ſame ſide put this caſe: If a man has iſſue two ſons, *A.* and *B.*, and *A.* has iſſue a daughter, and the grandfather deviſes a rent-charge out of his eſtate to the daughter of *A.* and then deviſes the eſtate to his heir male, no doubt the ſecond ſon ſhall take, though the daughter is heir; and ſaid, they came into this court only to know how the eſtate ſhould be ſettled.

Lechmere, by way of reply, ſaid, that the notion advanced by Mr. Attorney General, that the heir male of * the body of the great grandfather ſhould be in, *quaſi* by deſcent from him, was entirely new, and was attended with very great inconveniences; for then laying *Edward Barkham* quite out of the caſe, ſuppoſe the ſiſter had been dead, leaving a ſon, he would be compleatly heir and male too, and yet he could never take, becauſe derived through a female; and if *Edward Barkham* was to bring a *Formedon* in this caſe, he could not lay the *Eſplees* in his great grandfather; and cited *Litt. ſect.* 30. and my Lord *Coke's* opinion thereon, and the caſe of *Mandeville* there cited. 448

Lord Chancellor. This will is perfectly executory, a conveyance is ſtill to be made, and they come into this court to direct the manner of it; ſuppoſe *Edward* had been heir and heir male of the body of the great grandfather, the conveyance could

could never be made in the very words of the will, for then he could not take at all: it is like the caſe of marriage articles for ſettlement of an eſtate on the huſband, and heirs male of his body; yet when they come into this court for a ſpecific execution, the court models the ſettlement ſo as to make it effectual, and will give the huſband but an eſtate for life. The ſpecial heir male in this caſe was certainly within the teſtator's intention to take; but as it had been ſo ſolemnly argued, he would take time to look into the books before he would give his opinion; but ſaid he was ſtrongly of opinion for *Edward* the ſpecial heir male, and thought that the ſettlement ought to be made to him, and the heirs male of the body of the great grandfather.

Vid. Poſt, 461.

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Caſe 288.

* Lord Pawlet *verſus* Parry.

2 Eq. abr. 369, c. 1. S. C. 497. 514. Viner's Abr. (tit. *Charge*) 461, pl. 16. S. C. 1 Vernon, 411. 2 Vernon, 228. S. P. 3 Wms. 323. 1 Vezey, 500. the land charged.—*à contrà*, 2 Wms. 187.

A man makes his will in the following manner: As to the diſpoſal of my worldly eſtate, I give and deviſe, &c. and then gives his lands to his eldeſt ſon in tail, remainder to his three other ſons in tail, and deviſes copper mines and other eſtates to his eldeſt ſon, to be ſold for payment of his debts, and gives his daughter 1500*l.*; there not being perſonal eſtate ſufficient to pay this legacy, whether real eſtate, by the words of this will, ſhall be charged therewith?

THE defendant's father, by his will, in 1702, deviſes as follows: As to the diſpoſal of my eſtate, I give and deviſe the ſame as followeth; and then he deviſes ſeveral lands, of about 400*l. per ann.* being the bulk of his eſtate, to his ſon *Charles*, the defendant, who was his heir, and to the heirs male of his body; and for want of ſuch iſſue, to three other of his ſons, in tail male ſucceſſively, with remainder to his own right heirs; then he gives ſome copper mines, and other eſtates, to his ſon *Charles*, in truſt, to be ſold for the payment of his debts; and after gives to his daughter (with whom the plaintiff had intermarried) 30*l.* a year till ſhe ſhould attain her age of 12 years, and after 50*l.* a year till ſhe ſhould be married, and gives her 1500*l.* marriage portion, to be paid her by his ſaid ſon *Charles* within three months after ſuch marriage; makes his ſon *Charles* executor, and dies; and this bill was now brought to ſubject the real eſtate, in the hands of the defendant *Charles*, to the payment of this legacy: it was agreed that there was no expreſs clauſe in the will to that purpoſe.

It

It was argued, that there were words tantamount; that he begins with the diſpoſal of his eſtate, which muſt be intended all his eſtate, as well real as perſonal; that the word eſtate more properly denoted his real eſtate than his perſonal; that this legacy was expreſsly deviſed to be paid by his ſon *Charles*, who had both his real and perſonal eſtate; and therefore, in defect of one, the other muſt ſtand charged in his hands to make it up; that it was in behalf of a daughter, who would otherwiſe be unprovided for; and though the eſtate was deviſed to his ſon *Charles* in tail, yet that could make no difference, for it was a charge that run along with the eſtate, and bound it, in whoſe hands ſoever it came; and they * cited a caſe between † *Glentley* † 1 Vernon, 411. *and Pelham* the 19th of *December* 1686, and a caſe of *Sherwood* 450 *and Sherwood* at the Rolls.

On the other ſide it was argued, that here was no intent to charge this eſtate with the payment of this 1500 *l.*; that if it ſhould be ſo taken, the deviſe to his ſon *Charles* in tail muſt be ſole, for he muſt ſuffer a common recovery, and make himſelf tenant in fee, in order to raiſe it; that this would entirely deſtroy all the remainders to his other ſons, and ſo fruſtrate the deviſe to them, which he could never be ſuppoſed to intend by this deviſe of 1500 *l.* to his daughter, being all in the ſame will; that the caſes wherein ſuch charge had been allowed on lands, were where the charge was expreſsly mentioned in the ſame clauſe, as a deviſe to his ſon in tail, deſiring him, or to the intent, that he ſhould pay his legacies; that it could not be pretended thoſe lands were charged to the payment of his debts, for he had made an expreſs proviſion for them out of another part of his eſtate; that if he had intended to have charged his lands with this legacy, he would have made an expreſs deviſe for that purpoſe; and that no caſe had ever been carried ſo far as was now contended for.

My Lord Chancellor ſaid, thoſe laſt arguments were of much more weight with him than what had been offered on the other ſide; that he ſhould deſire to ſee the precedents in black and white; that they often came out different from what they were

cited;

cited; that there was a ſort of inclination in each ſide to make the precedents generally ſpeak for them; that he did not ſpeak this by way of cenſure, but commended it as the beſt means to come at the juſtice of a cauſe, becauſe there were learned men on the other ſide to ſet them right; that unleſs the precedents were very ſtrong, he could ſee no reaſon to charge the lands in this caſe, and therefore ordered them to be ſearched; but in the mean time ſent it to a Maſter to take an account of the perſonal eſtate, to ſee if, on a probable computation, there was
451 ſufficient of the * perſonal eſtate, at the making of the will, to have anſwered the legacy.

Caſe 289.

Wainright *verſus* Bendlows.

Gilb. Chan. 313. 1 Eq. abr. p. 12. 271. Antè, 2, 101. 423. 2 Vern. 718. S. C.—Vid. † Brown's Rep. 145, 454 to 467. 2. 1770. 60.

Where the teſtator makes a particular proviſion out of his real eſtate for the payment of his debts, the perſonal eſtate *ſhall not be liable to them.*

A Man by his will deviſed all his fee-farm rents in the county of *Northumberland* to two truſtees, and their heirs, in truſt, to ſell for payment of his debts, and the reſidue of the money ariſing thereby he deviſes to his two ſons, equally to be divided between them; then he gives ſeveral of his goods to go along with his eſtate as heir-looms, and deviſes all the reſidue of his ſtock, goods, and chattels, to his ſiſter the defendant, whom he made ſole executrix: and this bill was brought to ſubject the perſonal eſtate, in the firſt place, to the payment of debts, in eaſe and exoneration of the real eſtate deviſed for that purpoſe.

And it was urged, that this was the conſtant courſe of this
† 2 Vern. 252. court, and cited my † *Lady Gainſborough's caſe*; and a caſe of *Coſt and Moor*, upon the Earl of *Meath*'s will; and a caſe of
‡ 2 Vern. 568. ‡ *Chicheſter* verſus *French*.

† There are numerous authorities, which might be referred to in affirmance as well as denial of the queſtion, reſpecting the doctrine upon this ſubject: it may not be improper to remind the reader, that the moſt material caſes are thoroughly recognized in the modern caſe of *Mayer* v. *Duke of Ancaſter*, Brown's Rep. 454.

On

On the other ſide it was argued, that here was an expreſs fund deviſed for the payment of his debts; that there was a great deal of difference between a bare charge on his real eſtate for payment of his debts, as by a deviſe of a term thereout for that purpoſe, and the caſe in queſtion; that here he had given his lands out and out, and had parted with them for ever, ſo that he never intended any of them ſhould remain in his family; that theſe lands were now to be looked upon as money, and conſequently, in a court of equity, were part of his perſonal eſtate, and ſo had been held in *Roper* and *Ratcliff*'s caſe upon the popiſh act of 11 *W.* 3. about two years ago, and other caſes; that the reſidue of his goods, chattels, and ſtock, muſt be intended the reſidue of thoſe which were not ſpecifically deviſed as heir-looms; and 1 *Lev.* 203. there is an expreſs difference between a bare charge on his real eſtate, and where it * is deviſed, as in this caſe, to be ſold for the payment of his debts. 452

My Lord Chancellor was clear of this opinion, and decreed, that the perſonal eſtate was not liable to the debts in this caſe.

Sympſon *verſus* Hornſby. Caſe 290.

J. C. as it ſeems, tho' by a diff. name, 2 Vern. 722.

Vid. Antè, 439.

MY Lord Chancellor having taken time to conſider of this caſe, did now deliver his opinion; by which it appeared, that the teſtator by his codicil had given his perſonal eſtate to ſuch uſes as his wife, with the conſent of his truſtees, ſhould direct; and the wife had taken upon her to diſpoſe of it by her will, without any ſuch conſent, which my Lord Chancellor ſaid was a void diſpoſition, and the teſtator, as to that, muſt be ſaid to die inteſtate, *ab initio*, and ordered a diſtribution accordingly.

If a man by will impowers his wife to diſpoſe of his perſonal eſtate with the conſent of the truſtees, the wife, without ſuch conſent, cannot by her will deviſe it, and therefore the huſband, as to that part, is dead inteſtate.

As to the other points, he was of opinion, that the wife took no eſtate for life by implication, for he had, in the foregoing

going part of his will, deviſed ſeveral lands to her for life, for her jointure, and in full of all claims and demands whatſoever, both in law and equity; and when he after deviſes, after the death of his wife, all his lands, tenements, rents, reverſions, profits, and hereditaments whatſoever (not before diſpoſed of) to his daughter, *&c.* this ſhall be taken diſtributively, that is to ſay, all the lands which he had before given his wife, to go to his daughter after her death, and all other his lands, not before deviſed, to his daughter immediately; and to make any other conſtruction on theſe general words would be abſurd, when he had before, in ſuch full and expreſs words, provided for his wife beſides; that in no caſe an heir at law is to be diſinherited by implication, unleſs it be neceſſary, which in this caſe it is not.

Antè, 381.

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‖ Vid. Douglas, 337. *Hodgſon & Ux*. *Ambroſe & al*.

‖ * And as to the other point, he ſaid, he looked into the books, and found it already ſettled, that *Bridget* dying in the life-time of the teſtator, the heirs male of her body could not take by purchaſe, for theſe words were inſerted to expreſs the quantity of the eſtate; but if this were perfectly *res integra*, he thought it plainly the intention of the teſtator, that *Jane* ſhould not take till there was a failure of iſſue male of *Bridget*, for ſo he thought the words, *and for want of ſuch iſſue*, fully imported; but ſince it had been ſo often reſolved otherwiſe, he was now bound by theſe reſolutions, as it was merely a point of law; but ſince it was ſo, and an heir at law diſinherited as to a moiety, he would decree no account of the rents and profits, there being no infant in the caſe, but left them to their remedy at law by entry and ejectment, and ſaid, it would be very unequitable to aſſiſt them in this caſe.

It was afterwards moved for ſome further directions touching the diſpoſition of the ſurplus of the perſonal eſtate, and the counſel mentioned the caſe of † *Britton and Vachell*, where Mr. *Britton*, having ſeveral children, gave to his eldeſt ſon (who had diſobliged him) 10*s*. and no more, and gave his executor a legacy, and made no diſpoſition of the ſurplus; and it was decreed

† Antè, 169.

creed at the Rolls, that the eldeſt ſon ſhould be let into his diſtributary part with the reſt of the children: but this decree was reverſed in the Houſe of Lords, upon the expreſs words of the will, which excluded the eldeſt ſon from any more than his 10*s.*; but the court ſaid, this was nothing like the preſent caſe, which depended on other circumſtances, and accordingly the decree was ſettled.

*DE

Termino S. Hillarii,

1716.

In Curia Cancellariæ.

Caſe 291.

† Lord Bernard's Caſe.

1 Eq. abr. 400, pl. 1. S. C. and 399 (n.) 2 Eq. abr. 758, p. 7, 8. 22 Viner abr. 523. pl. 11. 2 Vern. 738. S. C. 1 Salk. 161. S. C. Gilb. Eq. Rep. 127. Gilb. Ch. 193. S. C. 1 Wms. 528. 3 Wms. 267. 3 Atk. 215. 1 Vezey, 264, and 546. Brown's Rep. 167, and (n.)

A court of equity will not only grant an injunction to ſtay tenant for life, without impeachment of waſte, from defacing the manſion-houſe, but will likewiſe oblige him to put it in the ſame plight.

LORD *Bernard* was tenant for life, without impeachment of waſte; and this bill was brought againſt him by thoſe in remainder, for an injunction to ſtay his committing of waſte; and by the proofs in the cauſe it appeared, that he had almoſt totally defaced the manſion-houſe, by pulling down great part, and was going on entirely to ruin it; whereupon the court not only granted an injunction againſt him, to ſtay his committing further waſte, but alſo ordered a commiſſion to iſſue to ſix commiſſioners, whereof he to have notice, and to appoint three on his part; or, in default thereof, the ſix commiſſioners to be named *ex parte*, to take a view, and to make a report, of the waſte committed; and that he ſhould be obliged to rebuild, and put it in the ſame plight and condition it was at the time of his entry thereon: and it was ſaid, that the like injunctions had frequently been granted in this court; and that the clauſes of *without impeachment of waſte* never were extended to allow

† Vid. *Fitzherbert's Natura Brevium*, 125.

the

the very deſtruction of the eſtate itſelf, but only to excuſe from permiſſive waſte; and therefore ſuch a clauſe would * not give leave to fell and cut down the trees which were for the ornament or ſhelter of a houſe, much leſs to deſtroy or demoliſh the houſe; and ſo it was ruled in my Lord *Nottingham*'s time, 2 *Chan. Caſes*, 32. 455

Humerſton *verſus* Humerſton. Caſe 292.

2 Vern. 737. S. C. 1 Eq. abr. 207, pl. 8. 3 Burrows, 1632. 1 Wms. 332. S. C. 605. 2 Vezey, 568. Gilb. Eq. Rep. 128. S. C. Fearne's Cont. Rem. 392. S. C.

THERE were ſeveral queſtions in this caſe, which aroſe upon the will of one *Matthew Humerſton*; one whereof was concerning his intention to perpetuate his name, for which purpoſe he had given a very conſiderable eſtate to the drapers company, and their ſucceſſors, for ever, upon truſt, to ſettle the ſame on ſuch a one of the name of *Humerſton*, for his life, and, after his death, to his firſt ſon for life only, and ſo to the ſecond, and all other his ſons, for life only; and for want of ſuch iſſue, then to another of the name of *Humerſton* for his life, and ſo to his firſt and other ſons for life only; and for want of ſuch iſſue, then to another of the name of *Humerſton*; and ſo reckoned up about 50 of that name, to whom he gave only eſtates for life, with like remainders for life to the firſt and other ſons of each of them reſpectively, as they ſhould become entitled thereto; and if there were none of that name to be found in *England*, then the truſtees and others were to chooſe out the moſt comely young man they could find in ſuch a pariſh, and he to take upon him the name of *Humerſton*, and then the eſtate to be ſettled on him for life, with ſeveral limitations over in the like manner, without limiting an eſtate in tail, or in fee, to them, or making any diſpoſition of the fee.

A. deviſes lands to the drapers company, in truſt, to convey to *B.* for life; remainder to his firſt, &c. ſons, for their lives ſucceſſively, and ſo to their iſſue male, for their lives only, &c. Though this be a vain attempt of a perpetuity, yet the truſtees ſhall make as ſtrict a ſettlement as may be, making all the perſons in being but tenants for life; but the limitation to the ſon unborn muſt be in tail.

But both court and counſel held this to be ſuch an affectation of a perpetuity, that nothing was ſaid in ſupport of it; only the limitations for life to the ſeveral perſons *in eſſe* were held good, and a ſettlement decreed to be made accordingly; *viz.* to the firſt *Humerſton* * named in the will, for life; remainder to truſ- 456

tees, during his life, to ſupport contingent remainders; with remainder to his firſt ſon, and the heirs males of his body, and ſo to the ſecond ſon in like manner; and for want of ſuch iſſue to the others in remainder, ſucceſſively, in like manner: and it was held clearly, that the words, † *and for want of ſuch iſſue*, in the will, would not raiſe an eſtate tail by implication to the firſt *Humerſton*, who was to take, againſt ſuch expreſs limitations to him, for life only. 1 *Leon.* 256. *Manning* and *Andrews*, was cited.

† Vid. 1 Wms. 54, and 605.

Caſe 293.

Dolman and Smith.

2 Vern. 740. S. C. Antè, 2. 101. 451. Gilb. Chan. 314. Gilb. Eq. Rep. 128. 2 Eq. abr. 496, pl. 13. S. C.

A. directed his debts and legacies to be paid out of the rents of his real eſtate, and that his executors ſhould receive the rents until his nephew comes to the age of 25 years, and to pay the ſurplus of the rents to his nephew at 25, and deviſes the reſidue of his perſonal eſtate to his nephew. The nephew dies an infant; the ſurplus of the perſonal eſtate not being given to a ſtranger, but to the ſame perſon to whom the lands were given, cannot be taken to be exempt from the debts.

SIR *Thomas Dolman* by will, the 5th of *February*, 1710, deviſes all his houſehold goods and furniture to the defendant *Sarah Smith*, and 1000*l.* to the plaintiff *Dorothy Dolman*, his niece, payable at 25, and likewiſe 500*l.* to the plaintiff *Lewis Dolman*, payable at 25; then he deviſes all his manors, lands, tenements, and hereditaments, to truſtees, and their heirs, in truſt, for the payment of his debts, legacies, and funeral, and does by will expreſsly charge them with the payment thereof; then he directs, that his truſtees ſhall receive the rents and profits of his ſaid eſtate, till his nephew *Thomas Humphry Dolman* ſhould attain his age of 25 years, and thereout to allow him 30*l.* *per ann.* and 20*l.* *per ann.* apiece to the plaintiffs *Lewis* and *Dorothy*, till they ſhould all three attain their reſpective ages of 25 years; then he deviſes the reſidue of the rents and profits of the ſaid eſtate, together with the ſaid eſtate, to his ſaid nephew *Thomas Humphry Dolman*, in tail male; remainder to the plaintiffs *Lewis* and *Dorothy*, in tail male ſucceſſively; remainder in like manner to three of the defendants, with remainder to the right heirs of one of them, who was a ſtranger, and no relation to the family; then he deviſes ſeveral things to go along with his eſtate, as heir-looms; and afterwards deviſes all * the reſt and reſidue of his goods, chattels, and perſonal eſtate, before unbequeathed, to his ſaid nephew *Thomas Humphry Dolman*, and

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makes the truſtees his executors, and dies. *Thomas Humphry Dolman* dies about a year after, without iſſue, being then of the age of nine years only: the plaintiff *Mary* his mother adminiſtered to him; and the only queſtion was, Whether the perſonal eſtate in this caſe belonged to the adminiſtratrix of *Thomas Humphry Dolman*, exempt from debts, legacies, and funeral expences, or if the perſonal eſtate ſhould be applied, in the firſt place, towards ſatisfaction thereof, notwithſtanding this expreſs charge on the real eſtate for payment thereof? But which way ſoever it was taken, it was agreed the ſurplus of the perſonal eſtate ſhould be ſubject to diſtribution, between the mother and the plaintiffs *Lewis* and *Dorothy*.

It was urged for the plaintiffs, that he had in this caſe *expreſsly charged his real eſtate with the payment of his debts, legacies, and funeral expences*, and therefore the perſonal eſtate ought to be exempt therefrom; that he had *ſpecifically* deviſed away a conſiderable part of his perſonal eſtate, and that, without queſtion, was not ſubject thereto; no more, as it was urged, could the reſidue in this caſe, becauſe the deviſing of it by ſuch general words was only to ſave the trouble of enumerating particulars, which if the teſtator had done, that would have made it a *ſpecific* deviſe thereof, and conſequently as much exempt as the particulars before deviſed; that the deviſe was *of the reſidue before unbequeathed*, ſo that every thing but what was before bequeathed or deviſed muſt paſs by this clauſe, and no room left to confine it only to the reſidue after debts, *&c.* which, if the words had been general, might have been ſuppoſed the intent of the teſtator. Antè, 451, and (n.)

On the other ſide it was urged, that the perſonal eſtate was the natural fund for payment of debts; that if there was no clauſe to exempt it, this court had always ſubjected it, in the firſt place, notwithſtanding * any deviſe of the real eſtate, for payment thereof; that the perſonal eſtate had been made liable in this court, where the real eſtate had been expreſsly deviſed to be ſold for the payment thereof, *where the lands being to be ſold out and out*, the teſtator could not be ſuppoſed to have any regard to his heir; that the charging his real eſtate in theſe caſes, was only in aid of his perſonal eſtate, in caſe that ſhould not be 458

† Antè, 3.

ſufficient; that the † *Heres Factus* as well as the *Heres Natus* had always been allowed the benefit of the perſonal eſtate towards ſatisfaction of the debts, in the firſt place; ‡ that if an eſtate *deſcended* with an encumbrance to the heir, that he ſhould have the aid of the perſonal eſtate to diſencumber it.

‡ Antè, 423. 6 Brown's Parl. Caſes, 520.

§ But to this Mr. *Vernon* ſaid, that that could be only where there was an expreſs covenant for payment of the money, which deſcended in point of lien along with the eſtate; yet by reaſon of the covenant, which was perſonal, the executors ſhould be bound to diſcharge it out of the perſonal eſtate, in the firſt place; but there was no pretence in the world, that if a man purchaſed an eſtate ſubject to an encumbrance, that his heir ſhould have aid of the perſonal eſtate to diſencumber it.

§ *Tweddell* v. *Tweddell*, determined upon demurrer, *July* 18th, 1786.

My Lord Chancellor, on the whole frame of the will, was of opinion, that the perſonal eſtate was to be applied, in the firſt place, in eaſe of the real eſtate: *Firſt*, ‖ Becauſe there was no expreſs clauſe to exempt the perſonal eſtate, and that had been always the diſtinction taken in this court. 2*dly*, It appears, that the heir of this family was not to have the real eſtate till his age of 25 years, nay, not ſo much as the rents and profits which ſhould actually fall and become due before that age; that the teſtator appeared throughout *to carry a very frugal intention*, and therefore would allow his heir no more than 30*l.* a year for his maintenance, and that too carried beyond the uſual time of his age of 21 years, for he was to be truſted with nothing more even till his * age of 25 years; and can it then be thought he intended indefinitely to truſt him with the perſonal eſtate without limitation to any age, ſo that he might ſquander it all away, and waſte it as ſoon as ever he came to it? That both the real and perſonal eſtate in this caſe were to come into the ſame hand, and therefore he could have no ſuch frugal intention with regard to the one, and leave it ſo looſe as to the other; that if the perſonal eſtate had been deviſed to a ſtranger, it might have had another conſideration from the meaning of the words *before unbequeathed*, but here he thought it could not, and accordingly decreed the perſonal eſtate to be ſubject, in the firſt place, to the debts and legacies.

‖ Vid. Brown's Rep. 460. Lord *Thurlow*'s decree.

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Onyons

Onyons *verſus* Tryers.

Caſe 294.

2 Vern. 741. S. C. 1 Eq. abr. 407, pl. 1. S. C. 2 Vern. 741. Gilb. 130. 1 Wms. 343. 3. C. 2 Mod. 258. 2 Atk. 268. 4 Burrows, 2512. 7 Brown's Parl. Caſes, 344. Cowper, 49, and 87. Douglas, 40†. 3 Wilſon, 497. 2 Blackſt. 937.

A Man makes his will, duly executed and atteſted according to the Statute of Frauds and Perjuries, and at the ſame time, in like manner, executes a duplicate thereof; ſome time after, the teſtator having a mind to change one of his truſtees, orders his will to be wrote over again, without any variation whatſoever from the firſt, ſave only in the name of that truſtee, and when it was ſo wrote over, he executes it in the preſence of three witneſſes, and the three witneſſes ſubſcribed their names, but not in his preſence; after this the teſtator cancels the duplicate by tearing off the ſeal, and then dies, and the queſtion now was, Whether this ſecond will not being good as a will to paſs lands, ſhould yet be a revocation of the firſt? And if it ſhould not, Whether the cancelling of the other ſhould be a revocation thereof, within the Statute of Frauds and Perjuries?

One deviſes his land by will, atteſted by three witneſſes, and afterwards makes another will of his land, which revokes all former wills; but this will *is not duly executed: the laſt will being no will, and void, will not amount to a revocation of the former.*

And it was decreed, that neither the making of the ſecond, nor the cancelling of the firſt, was a revocation thereof, though in the ſecond there was an expreſs clauſe, that he did thereby revoke all former and other wills.

‡ * Wherein my Lord Chancellor took this diſtinction; that the ſecond *was not intended* as an effectual will to paſs the lands to the perſons, and in the manner thereby deviſed, and therefore if it was not good as a will to that purpoſe, it was no revocation of the firſt; and if a man by his will deviſes lands to *A.* and af- 460

† The ſubſtance of the ſeveral authorities appears to be, that the mere act of cancelling doth not effect a revocation, unleſs done *animo revocandi*. An abundance of curious and intereſting information upon this ſubject is to be found in *Swinburn*, 523 to 539.

‡ In the deciſion of *Gilbert* v. *Burtonſhaw* (Cowper, 52.) Lord *M.* obſerves, that the whole queſtion in the above caſe turned upon the act of cancelling being under a miſtake. His lordſhip adds, "there was ſome doubt upon the evidence, whether the firſt will was cancelled at all; but Lord *Cowper* there ſays, ſuppoſing the firſt will had been cancelled, the teſtator did not mean to do ſo, becauſe the deviſes in the ſecond will are preciſely the ſame as thoſe in the firſt, and to the ſame perſon. He did it therefore upon a ſuppoſition that he had executed the latter according to the *Statute of Frauds*, not *with a deſign* to revoke the deviſes, as to the real eſtate: it is clear, therefore, that the ground of the determination in that caſe was, its being a *cancelling by miſtake*, not that the firſt will was revived for want of the latter being duly atteſted."

ter makes a ſecond will, and thereby deviſes the ſame lands to *B.* if this ſecond will be not good as a will to paſs the lands to *B.* it ſhall be no revocation of the deviſe in the firſt to *A.* for it is plain *A.* was to loſe only what *B.* was to gain, and if *B.* gains nothing by the ſecond, *A.* ſhall loſe nothing that was given by the firſt; but if a man executes a ſecond will, which appears to have *no other intention* than only to revoke his firſt, and to die inteſtate, though his ſecond be not in all circumſtances duly executed as a will whereby to paſs lands, yet it will operate as a revocation of the firſt.

And as to the cancelling or tearing of the firſt will, that is no revocation of it in this caſe, becauſe that was no ſelf-ſubſiſting independent act, but done to accompany or in way of affirmation of the ſecond; it was done from an opinion that the ſecond had effectually revoked the firſt, and therefore he tears the firſt as of no uſe; but if the firſt was not effectually revoked by the ſecond, that act of tearing the firſt will not deſtroy it neither, for though a man may by the Statute of Frauds as effectually deſtroy his will by tearing or cancelling it as by making a ſecond, when he intends that as a revocation of the firſt, yet if it be inſufficient for that purpoſe, as in the principal caſe, the tearing and cancelling of the firſt *being only in conſequence of his opinion that he made good the ſecond will*, ſhall not deſtroy the firſt, but it ought to be ſet up again in this court: and he ſaid he thought this was conſiſtent with the reſolutions that had been given in 3 *Mod.* 258. 1 *Shower*, 89. † *Eggleſton* and *Speak*, and a caſe cited by Serjeant *Hooper* in *C. B.* where a man by will gave * lands to *A.* for life, remainder to *B.* in fee; and after, by a ſecond will, executed in the preſence of three witneſſes, but not ſigned by the witneſſes in the teſtator's preſence, he gave the ſame lands to *A.* again for life, remainder to *C.* in fee; this was held no revocation of the remainder to *B.* notwithſtanding an expreſs clauſe of revoking all former wills; and it was held clearly, that the cancelling or revoking either of the duplicate or original will is an effectual avoiding of both, they being both but one will, and therefore muſt ſtand or fall together.

† Swinb. 533. 461

Brown

Brown and Barkham. Caſe 295.

Antè, 286. S. C. Antè, 54. S. P. *è contrà.*

MY Lord Chancellor having taken time to conſider of this caſe, did now deliver his opinion to the following effect: He put the caſe at large, and then premiſed, that naturally and according to the common unprejudiced reaſon of mankind, every one, at firſt reading of this will, would be clear of opinion, that the teſtator's intent in this caſe was to give his eſtate to his heir male, and none but a lawyer, or one whoſe judgment was biaſſed with the learning of the law, could poſſibly underſtand it otherwiſe; but ſince reſolutions of law and decrees of equity have from time to time eſtabliſhed certain rules and artificial modes of property, he thought it neceſſary to conſider ſuch of them as had been cited and made uſe of to diſprove this natural conſtruction of the will before he gave his own judgment.

A. deviſes lands in truſt, after debts paid, to convey the premiſſes to the heirs male of the body of *B.* the teſtator's great grandfather. *C.* is the heir male of the body of *B.* but not heir general, there being a daughter of an elder brother, who is heir general, yet the truſtees ſhall convey to *C.*: as *C.* would be well entitled to take as heir male by deſcent, ſo is he ſufficiently deſcribed to take by purchaſe.

The firſt that has been cited is, that he who takes as heir, or heir male, cannot take whilſt his anceſtor is living; for the rule is, that *nemo eſt heres viventis*, and this is *Archer*'s caſe, 1 *Co.* 66.; but that rule makes nothing in the preſent caſe: *Firſt*, Becauſe here the anceſtor was actually dead at the time that this deviſe took place. 2*dly*, Becauſe here the words of the deviſe are * all ſtrictly and literally verified of the perſon that is 462
to take as heir male when the deviſe took place, and therefore nothing can be inferred from that rule to influence the preſent caſe; for in *Archer*'s caſe, the words were not all true of him who was to take as heir male, for his anceſtor was living at the time when the will took effect, and therefore, according to the rule mentioned, he could not take as heir male; but in our caſe, the anceſtor being dead, even long before the making of the will, the defendant *Barkham* may truly and literally be called his heir male, and conſequently capable of taking by that name, if nothing elſe hinders.

Another

Another caſe that has been cited, is the caſe of *Challoner* and *Bowyer*, 2 *Leon*, 70.; but that likewiſe is nothing to this purpoſe, becauſe there the eldeſt ſon was living when the remainder ſhould have veſted in the heir of his body, which it could not do during his father's life, for during his life he was no more heir male than he was heir female: ſo neither is the caſe in *Dyer* 99 *a.* of any force at all in the preſent queſtion, for there the ſon who claimed the remainder was to make himſelf right heir both of the body of his father and mother, which during his father's life he could not do; but in that caſe it is ſtrongly implied, that if the father had been dead, the ſon ſhould have taken as right heir of their two bodies.

A ſecond objection has been made, that he who takes as a purchaſer by the name of heir male, muſt anſwer the whole deſcription, that is, he muſt be both male and heir, which the defendant *Barkham* is not; but this is a rule which has no foundation in natural reaſon, but is raiſed and ſupported purely by the artificial reaſoning of lawyers; and under this head we may conſider the principal caſe of *Cownden* and *Clerk*, in *Hob.* and *Aſhurſt*'s caſe, cited at the end of that caſe, and alſo the caſe of † *Sterling* and *Ettrick* in this court, in all which caſes it is obſervable, 1*ſt*, That the limitations * were only to the heirs male, not ſaying of the body. 2*dly*, Whoever carefully obſerves the manner of my Lord *Hobart*'s argument, *fol.* 32. will find his own opinion to have been for the deviſe, if it had been made to the heirs male of the body, and there ſeems to have ſome miſtake crept into the print, in the tranſcribing that part of the caſe, which looks otherwiſe; and as to the caſe of *Sterling* and *Etterick*, beſides that there is no mention of the word body, that was in the caſe of *a deed*, directing a conveyance to his heir male, and therefore he thought the decree in that caſe extremely right, and ſhould have given the ſame if it had come before him.

† Antè, 54.

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But now none of all theſe caſes do in any ſort affect the preſent caſe; for if the reaſon of rejecting thoſe deviſes were good, becauſe both parts of the deſcription of the perſon intended to take were not true, the ſame will be a good reaſon for allowing the

the deviſe in the preſent caſe, where the whole deſcription is literally and ſtrictly true; for without queſtion one may take as heir male of the body of a perſon deceaſed, who is not heir general of the ſame perſon.

Firſt, Becauſe the intent of the teſtator is manifeſt, and appears at firſt view, who was the perſon meant to take thereby. 2*dly*, The diſtinction between taking by purchaſe, and taking by deſcent, where the words are the ſame, though it be mentioned in books of good authority, yet it ſeems to have no ſufficient foundation of reaſon or authority of law to ſupport it, and, if it ſhould prevail in all caſes, would overthrow another rule as certain and well eſtabliſhed, which is, that a perſon may take by purchaſe, if he be ſufficiently deſcribed, though he has neither addition of chriſtian or ſurname given him, nay, though his chriſtian name be falſe or miſtaken, as appears by ſeveral caſes put to this purpoſe in *Co. Lit.* 3 *a.*; and if ſo, then certainly ſuch a deſcription of the perſon as has all the marks and characters whereby he may be known, and is defective in none, * muſt be ſufficient to entitle him under that deſcription, and that 464
is the preſent caſe, for the words here are all true.

3*dly*, They are no more than are true, for *Edward Barkham*, in the ſtricteſt propriety of ſpeech, is heir male of the body of his great grandfather, and the books which are to the contrary infer to make out their concluſion that the words are not true (which ſhews that, if they are, the authority of thoſe books muſt fail) and that they are not true they endeavour to prove, by urging that the perſon who is to take by ſuch a deſcription muſt be both heir male and heir general, for if he fails in either he is not the perſon deſcribed; but this ſurely is no good reaſon, for though it be true that the word heir, taken ſingly by itſelf, can be true of none but him who is heir general, yet when it is joined with the words *male* or *female* of the body, they are true of him, or her, who deſcends from that body, though they are not heirs general, and to ſay otherwiſe is a very diſingenuous and unfair way of conſtruing words; for ſuppoſe a man has lands at common law, and other lands in *Borough Engliſh*, or

ſuppoſe

Vid. 1 Coke's Inſt. Harg. ed. 10. a. (n.) 4. Robinſon's Gavelkind, 94.

ſuppoſe a man has lands at common law, and other lands in *Gavelkind*, and he deviſes his lands at common law to his heirs in *Gavelkind*, in theſe caſes, if a man ſtops at the word *heir*, or *heirs*, it is certain the youngeſt ſon in the one caſe, or all the ſons in the other, cannot take, becauſe the eldeſt ſon only is heir, and therefore this can never be a juſt conſtruction of ſuch a will; but now take all the words together, and it is then moſt certainly a good deviſe to the youngeſt ſon, who is heir in *Borough Engliſh* in the one caſe, and to all the ſons, who are heirs in *Gavelkind* in the other: ſo in the principal caſe leave out the words *males of the body*, and then no doubt none but the heir general can take; but as theſe words were added, to diſtinguiſh him from the heir general, it would be a very unjuſt way of wreſting and perverting a man's words, to leave them
465 out purely * to let in another whom the teſtator never intended ſhould take; and though *the addition of thoſe words* was purely to diſtinguiſh him from the heir general, from whom theſe very words were added to diſtinguiſh the perſon deſcribed to take, which is all one as to ſay, that though the law allows an heir general, or heir ſpecial, two diſtinct perſons, yet none can take who is not both heir general and heir ſpecial in one perſon, which is to confound and deſtroy the very diſtinction itſelf.

Beſides, here the perſon intended to take is certain and known; *Edward Barkham*, and no other, is heir male of the body of his great grandfather, and the deſcription of him by theſe words is correct and perfect.

4*thly*, If the words heirs males of the body in the plural number are a ſufficient deſcription to convey lands by deſcent from the anceſtor to the heir male of his body, they are as ſufficient to paſs ſuch lands to the ſame heir male of that body by purchaſe, where the intent of the teſtator appears to be ſo; and this is not a conſtruction wrought upon the Statute *de Donis*, for that ſtatute does not determine or meddle with what words are words of purchaſe, and what not, or how the heir of the body that is to take ſhall be deſcribed, nor is there any ſuch diſtinction between a purchaſe and a deſcent ariſing upon that ſtatute; for the words

words here made uſe of in this deviſe were all at the common law long before the Statute *de Donis*, which did not create ſuch heir male of the body, for he would have taken by ſuch a deviſe at the common law, as ſufficiently deſcribed and known, and the ſtatute only confirms the deſcription; and this he ſaid was the principal reaſon of the opinion he was now to deliver, and the authorities which have been cited to the contrary do not at all come up to this caſe, there being no mention of the word *body* in any one of them; and as to the opinion of *Hob.* 32. that the words heirs males of the body are not ſufficient words of purchaſe, where another is heir general, he ſaid,

* 1*ſt*, That that point was not at all neceſſary for the determination of the principal caſe there. 2*dly*, From ſome expreſſions in that book, it looks rather like a miſtake in the tranſcriber, than *Hobart*'s own opinion. 3*dly*, If it were his opinion, it ſeems not to be law, becauſe a limitation to the heirs males of the body of a perſon dead before, was ſufficient to veſt in them by purchaſe within the ſtatute, and before the Statute *de Donis*; and ſo is *John de Mandevill*'s caſe, *Co. Lit.* 26. which he cited and applied; and ſaid, that the ſole difference in thoſe caſes was, between a deviſe to the heirs males or heirs females generally, and ſuch a deviſe to the heirs males or heirs females of the body; and as to *Shelley*'s caſe, 1 *Co.* though the principal caſe there, was rather a confirmation of this opinion, for there the anceſtor was dead at the time the limitation took place; and for my Lord *Coke*'s report of that caſe, it appears to be only his own argument, as he was of counſel in it; and though he does indeed lay down the diſtinction between taking by purchaſe, and taking by deſcent, yet *Wray*, Chief Juſtice, when he comes to ſum up the reaſons of the judgment, he takes no manner of notice of that diſtinction; ſo that it ſeems only to be my Lord *Coke*'s own opinion, without any authority to ſupport it; but then indeed this doctrine is again tranſcribed into his firſt *Inſtitute*, 24. and *Shelley*'s caſe cited for it, which is the only authority to warrant that diſtinction; for as to the year-books, referred to in the margin, he ſaid he had looked into every one of them, with all the care he could, that he might go to the bottom 466

bottom of this queſtion, and thoſe books are ſo far from warranting ſuch an opinion, that there is but one of them at all to the purpoſe, and that is directly contrary to what it is cited to prove, for as to the 9 *H.* 6. 23, 24. and 11 *H.* 6. 12. it was a limitation only to the heirs males, not heirs males of the body; beſides, that he was not in *eſſe* when the limitation to him was
467 to take place, * and therefore that caſe can be no ground for my Lord *Coke*'s opinion.

Another caſe cited to ſupport this opinion is the 37 *H.* 8. *Brok.* tit. *de Donis, ſect.* 61. but on looking into that caſe, it appears to be nothing at all to the purpoſe; and *Bro.* tit. *Moſme*, 1. 40. *Huſſey*'s caſe, there is no judicial reſolution on this point one way or the other; and *Dyer*, 347. is only an imperfect report of *Shelley*'s caſe: And from the weakneſs of theſe authorities to prove the doctrine continued, he took occaſion to obſerve, that there was no relying on ſudden opinions, as cited in books,

† Antè, 440. 453. † And for the ſupport of his own opinion, he cited *Pollex.* 454. and 2 *Ven.* 311. *Burchett* and *Durdant* al' *James* and *Richardſon*, which he ſaid was a much ſtronger caſe than this now in queſtion, for there the anceſtor was living, and yet it was held to be ſuch a deſcription of him, as to let him in during the life of his anceſtor, though that was a diſpenſion with the ancient maxim of law, *quod nemo eſt heres viventis*; but in our caſe no maxim of law is infringed; but the caſe of ‡ *Beaumont* and *Long*, in the Houſe of Lords lately, is ſtill a much ſtronger caſe, for there was not ſo much as the words *of the body*, yet the heir was admitted to be ſufficiently deſcribed to take, even in the life of his aunt *Long*, ſo that he thought the obiter opinions of my Lord *Coke* and *Hobart* to be very much outweighed by the authority of thoſe reſolutions.

‡ 1 Brown's Parl. Caſes, 489. S. C. Fearne's Cont. Rem. 145.

Then he cited the caſe of *Pibus* and *Mitford*, 1 *Vent.* 372. and ſaid, that my Lord *Hales* did not think fit to rely on the common point of the father's taking an eſtate for life by implication, but held the words *heirs males of the body of his ſecond wife* a ſufficient deſcription to veſt it in the heirs males of the body of ſuch wife by purchaſe; and though the reporter

of that caſe introduces the argument of my Lord *Hales*, only with his ſaying, that *of that he was not well ſatisfied*, yet in the argument of my Lord *Hales*, after he ſeems * to have profeſſedly 468
ſet about confuting that opinion, and takes notice of ſuch heir male as a ſpecial heir at common law before the Statute *de Donis*, who was capable of taking diſtinct from the heir general, and what he cites there out of *Lit. ſect.* 352. of performing the condition as near the intent as may be, proves, in the preſent caſe, that the ſettlement muſt be made to the perſon who is the heir ſpecial, and ſaid he had never met with any one caſe to the contrary, but only the opinions before-mentioned of *Coke* and *Hobart*; for the caſe at the end of *Pibus* and *Mitford* is directly in point for the ſpecial heir male; and in that caſe he took notice of his heir general, as he does in the preſent caſe, and therefore could never mean that his heir female ſhould take it, when he expreſsly gives it to his heir male; and in that caſe juſtice *Wyld* was of the ſame opinion in that particular, ſo that it has the authority of two judges there; and the reaſoning of my Lord *Hales* there, muſt ſurely convince all that heard it, and is much ſtronger than the before-mentioned opinions of *Coke* and *Hobart*, the laſt whereof amounts to no more than that he doubted of the law in this point.

Then he cited the caſe of *Baker* and *Wall*, *Trin.* 8 *W. Rot.* 1484, in *C. B.* where a man made his will in this manner: *I give to my eldeſt heir male, and his heir males for ever, all my lands, in ſuch a place, and if there be a female, ſhe to have* 12 *l. per ann. as long as ſhe lives*; and the teſtator having two ſons, the eldeſt, which was dead in his life-time, leaving a daughter, who was heir general, yet the youngeſt ſon went away with the land; and that caſe, as appears by the adjournments on the Rolls, was depending for a conſiderable time, ſo that ſeems to have been ſettled with great judgment and deliberation; and in that caſe there were ſeveral expreſſions to ſhew he never meant that his heir general ſhould take.

* As to the caſe of *Goodwright* and *Corniſh*, which has been 469
cited, he ſaid, it was nothing at all to the purpoſe, and therefore he took notice of it laſt of all.

And

And upon the whole concluded, that the words of this will were ſufficient to veſt the eſtate in queſtion in the heirs male of the body of the great grandfather; *1ſt*, Becauſe natural reaſon, common ſenſe, and the intent of the teſtator, call aloud for it. *2dly*, Becauſe the arguments to the contrary are now brought into a very narrow compaſs and weight. *3dly*, That the weight of them, if any, was over-weighed by judicial reſolutions in much ſtronger caſes: and therefore the only doubt now remaining was, how this truſt was to be executed; in conſidering whereof, he ſaid, that the limitation to the heirs males in the plural number made no manner of difficulty, for ſo was *Shelley*'s caſe; and when a conveyance comes to be made, it muſt be to the perſon who is heir male in the ſingular number, and the words are better and more ſkilful in the plural number than they would have been if they had only been in the ſingular, as they both denote the perſon who is to take, and do at the ſame time deſcribe the quantity of the eſtate he is to take.

And thereupon decreed that the truſtees ſhould execute a conveyance to *Edward Barkham*, and the heirs male of the body of his great grandfather, for in this caſe *æquitas ſequitur legem*, and the conveyance muſt be as near the intent of the teſtator as may be, according to the before-mentioned rule of *Lit. ſect.* 352. and a conveyance was decreed accordingly†.

† This caſe came on afterwards before Lord *Hardwicke*, upon a bill of review, when his Lordſhip affirmed the above decree, but upon other grounds, which did not coincide with Lord *Cowper*'s reaſons. For the ſatisfaction of the reader reſpecting this intricate doctrine, the editor begs leave to refer him to the learned and ingenious note of Mr. *Hargrave*, in his edition of Lord *Coke*'s Firſt Inſtitute (note 3, folio 24 b.) where he will find Lord *Coke*'s doctrine, its principles and diſtinctions, and the ſeveral authorities and caſes relative to it, thoroughly conſidered, and explained with the utmoſt clearneſs, accuracy, and judgment; to which is ſubjoined a note of Lord *Hardwicke*'s opinion upon his affirming the decree of Lord *Cowper* in the above caſe.—The editor alſo refers the reader to a ſubſequent note in Mr. *Hargrave*'s edition, 164 a. in which Mr. *H.* obſerves, that a caſe had been decided in the Court of King's Bench, after three arguments, againſt applying the rule *to a will*, *Willes and others* v. *Palmer*, 5 Burrows, 2615.—In another caſe alſo, which underwent as thorough an inveſtigation, the Court of Exchequer, as he had underſtood, refuſed to apply the rule *to a marriage ſettlement*, *Evans* on the demiſe of *Burtonſhaw* v. *Weſton*, determined in a ſpecial verdict in Scacc. Mich. 1774, or Hill. 1775. The cauſe had received a prior determination in *B. R.* in a caſe reſerved in an ejectment, in which *B.* was defendant, and there the caſe was argued three times. In both courts the judgment was againſt Mr. *B.* The queſtion upon the conſtruction of *heirs female of the body*, conſidered as words of purchaſe, was only a ſecondary point; but whether it was debated or not in *R. B.* he was not then informed.

D E

Termino Paſchæ,

1717.

In Curia Cancellariæ.

Northey *verſus* Burbage. Caſe 296.

6 Coke, 16. 2 Eq. abr. 264, c. 8, 9, and 331, c. 4. S. C. Gilb. Eq. Rep. 136. S. C. 9 Mod. 104. 1 Wms. 340. S. C. and 246. 487. 2 Vern. 105. 545. 710. 1 Vezey, 111. 201. 2 Atk. 121. 220. 329. Brown's Rep. 386. Cowper's Rep. 309.

By a deviſe to children and grandchildren, none can take but thoſe who are in *eſſe* at the time of the making of the will, unleſs there are future words which ſhew the teſtator's intent.

IN this caſe it was ſaid by the counſel, and agreed to by the court, that a deviſe to all his children and grandchildren extends only to thoſe who were in *eſſe* at the time when the will was made; for then the will ſpeaks, and none born after are to be let in, unleſs there had been future words in the will, to all his children or grandchildren which ſhould be born or be living at his death.

† 1 Vern. 397. Salk. 426.

A grandchild of a freeman of *London* cannot come in for a ſhare by the cuſtom.

† 2*dly*, That a grandchild is not, within the cuſtom of *London*, to come in for his father or mother's ſhare, together with the other children of a freeman; and this has been ſettled by the preſent Lord Chancellor, ‡ where a deed, by way of proviſion for a grandchild, being made by the grandfather, after the father's death, in order to introduce him into his father's place, was ‡ 2 Vern. 612.

ſet aſide, as made in fraud of the cuſtom againſt the ſurviving children.

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Vid. 3 Atk. 450. 2 Wms. 526.

Though a freeman of *London* by will declares that he had given ſome of his children 1000 *l.* apiece, in full of their orphanage part; yet this very declaration, upon bringing the advancement into *Hotchpotch*, entitles them to their full cuſtomary ſhare: but whether proof will be admitted to ſhew that the advancement was more than declared by the father, Q.?

‡ 3*dly*, The teſtator in the principal caſe being a freeman of *London*, by his will, in writing, declared, that * he had given 1000 *l.* to one, 1000 *l.* to another, and ſo to others of his children, in full of their orphanage part, by the cuſtom of *London*; yet this very declaration let them in, bringing thoſe ſums into *Hotchpot*, to their full cuſtomary ſhares of the whole: but whether the ſum mentioned in the will ſhould be taken to be the whole of what the teſtator had given them, or if the parties concerned were at liberty to prove more paid to them, was the greater queſtion, and the court ſeemed inclinable to let them into the proof thereof.

‖ 2 Vern. 207. 378. 388. 611. 653. 1 Wms. 97. 3 Wms. 113. Caſes temp. Talb. 124, and 126.

‖ *A.* deviſes 500 *l.* apiece to his two grandchildren by name; and if either of them die, his ſhare to go to the ſurvivor: one of them dies in the lifetime of the teſtator, his ſhare ſhall go to the ſurvivor, and is net a lapſed legacy.

4*thly*, A deviſe of 500 *l.* apiece to two of his grandchildren by name; and if either of them died, their ſhare to go to the ſurvivor; and if they both died, then their ſhares to their mother: one of them died in the life-time of the teſtator, yet his ſhare went by the expreſs words of this will to the other grandchild, and was held to be no lapſed legacy.

Caſe 297. † Piggot *verſus* Penrice.

Antè, 264. *ſecùs.* 1 Eq. abr. 209. 13. S. C. and 211, pl. 22. Caſes temp. Talb. 268. Gilb. Eq. Rep. 30, and 137. 2 Atk. 450. 1 Wilſon, 333. Cowper, 299. and 7 Brown's Parl. Caſes, 467.

A. deviſes to her niece in this manner, *I make my niece* G. *executrix of all my goods*, lands, *and chattels*, and dies, not having any leaſehold intereſt, yet her lands of inheritance paſs not by theſe words.

THIS was an appeal from the Rolls; and the only two points in queſtion were, 1*ſt*, Where the teſtatrix by will deviſed in this manner, *I make my niece* Gore *(ſince married to Sir* Henry Penrice) *executrix of all my goods, lands, and chattels,*

† See the caſe of *Rident* v. *Pain*, 3 Atk. 486. and 1 Vezey, 10. The teſtator at the end of his will deviſed as follows: "All the reſt, reſidue, and remainder of my goods, chattels, and perſonal eſtate, together with my real eſtate, not hereinbefore deviſed, I give to my wife, whom I appoint my *ſole executrix*." It was held, that the words, *together with my real eſtate*, paſſed a fee, notwithſtanding they were accompanied with the words, goods, chattels, and perſonal eſtate.

whether

whether any, and what, eſtate paſſed in the lands by this deviſe? it appearing in the cauſe, that the teſtatrix had no term or intereſt for years in any lands whatſoever, but an eſtate of inheritance in the lands in queſtion.

The ſecond point was, Where the teſtatrix had made a ſettlement, with power of revocation, by writing, executed under hand and ſeal in the preſence of three witneſſes, not being menial ſervants, and ſome time after being indiſpoſed, wrote a letter, which was proved and read in the cauſe, ſignifying her intentions to revoke thoſe uſes, and deſiring a deed might be prepared purſuant to her power for revocation thereof, and ſettling * the ſame on her niece *Gore*, whether this ſhould amount to a revocation, ſhe dying before any deed was prepared, or any revocation actually made? 472

As to the firſt point, it was argued that this deviſe was ſufficient to paſs the lands, and to give the deviſee an eſtate of inheritance therein; that if it were otherwiſe, the word *lands* would be uſeleſs, and muſt be rejected, there being no terms or intereſts for years in any other lands; that if one ſays in his will, † *I make ſuch a one univerſal heir*, that *will paſs not only his real eſtate, but his perſonal eſtate likewiſe*; and this has been oftentimes allowed, and yet theſe words are as improper, and as little applicable to a perſonal eſtate, as the words in the preſent caſe are to a real eſtate; that by making her niece executrix of her lands, ſhe gave her a power to ſell and diſpoſe of her lands, and that without queſtion would have paſſed a fee; and by this deviſe the lands are made ſubject to the payment of debts, and under the controul and management of the executrix, in the ſame manner as the goods and chattels whereof ſhe is made executrix in the ſame clauſe; and if ſhe ſhould have but an eſtate for life therein, ſhe might poſſibly die before ſhe were reimburſed out of the rents and profits what ſhe had paid for debts, which is the reaſon that a deviſe to one paying my debts will paſs a fee.

† Caſes temp. Talb. 268.

‡ As to the ſecond point, it was argued, from ſeveral expreſſions in the letter, that ſhe had a manifeſt intention to revoke

‡ 2 Vern. 69. 1 Eq. abr. 345, p. 14. 3 Salk. 277. 2 Wms. 227, and 490. 1 Atk. 563. 3 Atk. 156.

the ſettlement; that ſhe went as far as ſhe could towards it; that ſhe expreſsly gave directions to have a deed prepared for that purpoſe, and that the reaſon of its being not compleated was her dying ſo ſoon, which was the act of God; that if this letter had been ſealed and atteſted, purſuant to the power, it would without queſtion have been a ſufficient revocation: and they cited the † Earl of *Albemarle*'s caſe, where a power of revocation was to be in the preſence of ſix witneſſes, whereof three to be peers; yet it was held in * that caſe, that if the perſon were beyond ſea, or under any diſability of having three peers, and purſued his power of revocation in all other circumſtances, that it would be effectual in a court of equity.

† 2 Eq. abr. 671, c. 4. S. C.

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But my Lord Chancellor was ſo clear of opinion in both points againſt them, that he affirmed the decree without hearing the counſel on the other ſide. As to the firſt point, he ſaid, whatever his private opinion might be of the intent of the teſtatrix to give her niece theſe lands, yet in point of judgment he could not decree for her; that it was a moſt known and eſtabliſhed rule of law, that an heir is never to be diſinherited but by expreſs words or neceſſary implication; that here were neither in this caſe; that the word ‡ *lands* was not, however, uſeleſs or to be rejected, for that in all probability there might be rents in arrear of theſe lands, and by making her executrix of her lands, the rents of thoſe lands would paſs; *that nothing certain could be inferred from ſuch a deviſe*, and therefore he muſt not break into the ſettled rules of law to ſupport it.

‡ 1 Rolls abr. 613.

‖ As to the ſecond point, there might be good reaſons for putting herſelf under that reſtraint, in the manner of revocation, to prevent ſurprize or inadvertency; that here was no pretence of any obſtruction from the perſons who claimed under that ſettlement; that here was nothing more than beſpeaking a revocation, and the completion of it prevented by her death; that no caſe had ever yet gone ſo far, and therefore it was too hard for him, and affirmed the decree.

‖ 2 Eq. abr. 191, 6. S. C. and P.

Note;

In Curia Cancellariæ.

Note; The teſtatrix by will gave part of theſe lands to charitable uſes, and they were decreed at the Rolls to be good as an appointment upon the act of parliament, notwithſtanding there was no revocation; but that point was not now brought in queſtion.

* Hele *verſus* Bond.

Caſe 298.

May 9.

1 Eq. abr. 342, pl. 6. S. C. 1 Coke, 173, b. 16 Vin. abr. 496, pl. 13, and 498, pl. 2. 1 Ventris, 198. 2 Eq. abr. 671, c. 3. 2 Burrows, 1136. 2 Vezey, 211.

A. Makes a ſettlement, wherein was a power that he might, from time to time, by deed or writing under his hand and ſeal, revoke the uſes thereof, and by the ſame, or any other deed, limit and declare new uſes: in purſuance of this power, he revokes the old uſes, and by the ſame deed limits new uſes, without annexing any new power of revocation to theſe new uſes; afterwards, thinking he had, by virtue of the firſt ſettlement, a power of revocation, *toties quoties*, he by another deed revokes the laſt uſes, and again declares other uſes of the ſame lands; and if he had ſuch power was the queſtion.

One makes a ſettlement, with power by deed to revoke it, and by the ſame deed, or any other, from time to time, to limit new uſes; he revokes the ſettlement, and limits new uſes, but reſerves no further power to himſelf; he cannot by virtue of the firſt power limit any other uſes.

It was agreed he might, in the deed of revocation, have annexed a power of revoking the uſes thereby declared, and might afterwards have executed that power accordingly; but in this caſe there being no ſuch new power of revocation annexed to the new uſes, it was decreed, that his new power of revocation was executed, and at an end, and by conſequence that the revocation afterwards was without any warrant, and ſo the uſes limited upon the firſt revocation muſt ſtand; and this was this day affirmed in the Houſe of Peers, and agreed to be entirely a new caſe, and was very elaborately argued on both ſides.

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*DE Termino S. Mich. 1717.

In Curia Cancellariæ.

Caſe 299.

Furſaker and Robinſon.

1 2 Eq. abr. 123, pl. 9. S. C. Gilb. Chan. 243. 256. Gilb. Eq. Rep. 139. S. C. 2 Vern. 262, Wms. 465. 2 Vezey, 582.

Equity will not ſupply the want of a ſurrender, in behalf of a natural child.

ONE ſeiſed of lands, which by the cuſtom of the manor could only paſs by deed, ſurrender, or admittance, and having a natural daughter, does by deed, in conſideration of 300*l.* therein mentioned to be paid by the ſaid daughter, grant and convey thoſe lands to her and her heirs, and ſhe was admitted accordingly, but no ſurrender was made of theſe lands, as the cuſtom required; and at the foot of the admittance was a proviſo, that her reputed father ſhould hold and enjoy thoſe lands for his life; and alſo in the deed was a covenant for further aſſurance; but for want of a ſurrender, according to the cuſtom of the manor, this was agreed to be a defective conveyance: ſo this bill was brought againſt the heir at law to ſupply the defect, and to have further aſſurance according to the covenant; and whether this court could ſupply it in behalf of a natural daughter was the ſingle queſtion.

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It was urged for the daughter, that ſhe was to be conſidered as a purchaſer, having paid 300*l.* for it; but it was ſaid on the other ſide, that though the 300*l.* was mentioned in the deed to be paid, yet the plaintiff * could not make any proof that the money was paid: it was then further urged for the plaintiff, that after her birth, her father had married her mother, and therefore, though ſhe was a baſtard by our law, yet by the law of the Spiritual Court ſhe was looked upon as a *mulier puiſne*, though before the marriage ſhe was *baſtard eigne*, for that, by their law, *matrimonium ſubſequens tollit peccatum precedens*; but of this marriage with her mother likewiſe ſhe made no proof: then it was urged, that ſhe being his natural daughter, he was by the law of nature obliged to provide for her; and that this court ought to ſupply a defective conveyance intended for that purpoſe, as it had done in many inſtances for younger children; and the rather, by reaſon of the expreſs covenant for further aſſurance, which they came here to have a ſpecific performance of; and that ſhe ought to be looked upon as a purchaſer, and to have the benefit of that covenant. 476

On the other ſide it was argued by Sir *Thomas Powis*, and others, that though the reputed father, if he thought her to be his child, was by the law of nature obliged to provide for her, yet nobody elſe was; that this court was under no ſuch obligation; that ſhe was to be conſidered now as a mere ſtranger, and to ſupply a voluntary defective conveyance for a ſtranger, againſt an heir at law, was what was never attempted before; that ſhe was to be conſidered as *nullius filia*, and could not be conſidered as a child in any court, and that this court was to follow the law in ſuch caſes; that though her father might have a great affection for her, yet that was no ſuch affection as would raiſe a uſe at law; that the covenant for further aſſurance could not at all help the caſe, where the original conveyance itſelf was void; that if a man covenants to ſtand ſeiſed to the uſe of a mere ſtranger, and covenants to make further aſſurance, this covenant depending on the nature of the conveyance, if that be void, the covenant, * which is only auxiliary, and goes along 477

along with the eſtate, muſt be void too; that this was a copyhold that could not be affected even by a judgment at law, much leſs by a covenant that would not bind the heir at law of the copyhold; that in the caſe of † *Kettle and Thompſon*, in the time of my Lord *Somers*, it was held, that a man was not obliged to provide for his grandchildren, as he was for his children, which were then ſaid to be in the nature of a debt upon him, and as he was obliged to pay his debts, this was a debt of nature, which he was likewiſe obliged to pay, but not to his grandchildren; (but my Lord Chancellor ſeemed not to be ſatisfied with the difference, and ſaid, by the ſtatute law of 43 *Eliz.* a man was obliged to provide for his grandchildren:) but as to the caſe in queſtion, the court was of the ſame opinion, for the reaſons before given, and diſmiſſed the appeal from the Rolls; ‡ and as to the proviſo at the foot of the admittance, it was held repugnant and void, according to a caſe *Cro. Car.* or *Cro. Jac.* and the diſtinction taken in 4 *Co. Kite* and *Quinton*.

† 1 Salk. 187. S. C. 2 Vezey, 582. and 3 Atk. 508. S. P.

‡ Vid. 1 Wms. 61.

Caſe 300.

Howell and Price.

2. Bro. 101.

Antè, 2. 101. 456. Antè, 423. S. C. 2 Vern. 701. S. C. 1 Eq. abr. 270, pl. 7. S. C. 139, pl. 5. Gilb. Eq. Rep. 106. S. C. 1 Salk. 450. 1 Wms. 291. 347. 2 Wms. 455. 664. 3 Wms. 358. 4 Viner, 456, pl. 9. 6 Brown's Parl. Caſes, 520. 1 Coke's Inſt. Harg. ed. 208 b. to 209 b. § *Tweddell* v. *Tweddell*, determined upon demurrer *July* 18, 1786.

The perſonal eſtate ſhall be applied in exoneration of the real, in favour *as well of an hæres factus as an heir at law*, whether the executor takes it as executor, or it be deviſed to him, unleſs there are words to exempt it.

THIS cauſe now came on again to be argued, on ſeveral precedents produced, that the perſonal eſtate in the hands of the executor, whether it were expreſsly deviſed to him, or came to him only by virtue of his being made executor, that in both caſes, unleſs there was an expreſs clauſe to exempt it, that it ſhould be applied in eaſe and exoneration of the real eſtate; and that as well in behalf of a deviſee or *hæres factus* of the real eſtate, as of the *hæres natus*, for which the caſes cited were *Gray and Gray*, *Chicheſter and Phillips*, *Hale and Hale*, and other caſes.

My Lord Chancellor was now clear of opinion, that the perſonal eſtate in this caſe muſt be applied accordingly; for he

478 ſaid here was plainly a debt, though it was a * debt of a ſpecial

§ It is unneceſſary to ſtate the above caſe of *Tweddell* v. *Tweddell*, as the Reader will find it inſerted in Mr. *Brown*'s Additional Reports of Caſes in Chancery, and much more amply and accurately ſtated than it could have been in this publication.

nature

nature, and for which the ſecurity was limited; for on failure of payment on any *Michaelmas-day*, the mortgagee might bring his ejectment, and recover the poſſeſſion, which he ſhould hold till his debt is ſatisfied, or till payment by the mortgagor or his heirs; and though no action of debt or covenant lay, yet ſince there was a remedy for it, he thought it clearly a debt; and that the deviſe to his executors, as well to pay his debts, as to levy his debts, plainly ſhewed his intention to diſcharge all his debts thereout; and therefore this being a debt, though of a ſpecial nature, muſt be paid amongſt the reſt, though the plaintiff was not the immediate heir to the mortgagor, but only the heir of the heir.

Anonymous. Caſe 301.

3 Wms. 398. A judgment ſhall have no relation but from the time of ſigning.

IT was held by my Lord Chancellor, that, upon the Statute of Frauds and Perjuries, a judgment ſhall have no relation but from the time of the ſigning, not only as againſt purchaſers of the lands themſelves, but alſo as againſt prior judgments entered in the grand ſeſſions of *Wales*, to which that ſtatute does not extend; and therefore, as objected, the judgment in the Common Pleas, though ſubſequent in time to the other judgments at the grand ſeſſions, yet if it might relate to the firſt day of the term, it would take place of the other judgments: but my Lord ſaid, that a man who truſted his money on a judgment, was in ſome ſort a purchaſer of the land, as he might take out execution, and extend the land itſelf, and therefore if he found no judgment prior, he thought his ſecurity good; and that the rule the ſtatute had laid down for the ſafety of purchaſers of the lands themſelves, was a good rule to follow in the preſent caſe, and the relations were not to be favoured in a court of equity.

* But Sir *Thomas Powis* inſiſted ſtrongly, that the ſtatute extended only to purchaſers of the lands, and therefore ſaid, a judgment ſhould have the ſame relation ſtill, as it would have had at common law againſt a voluntary ſettlement, or againſt 479

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one who came to the lands by any conveyance without valuable conſideration; and this was not denied by the court: but in the preſent caſe, if the ſubſequent judgment in the Common Pleas ſhould have ſuch relation, it would defeat real creditors, who truſted to the priority of their judgment, which my Lord Chancellor thought ought not to be overthrown by a fiction of law.

*DE 480

Termino S. Hillarii,

1717.

In Curia Cancellariæ.

Marſhall *verſus* Frank & Ux'. Caſe 302.

2 Eq. abr. 70, c. 8. 282, c. 2. S. C. Gilb. Rep. 143. S. C.

Where a ſettlement ſhall be good and take effect, though not according to the intent of the parties.

ONE having iſſue a daughter by his firſt wife, who was dead, and being poſſeſſed of ſeveral meſſuages for a term of 999 years, makes a mortgage of them for ſecuring the ſum of 100*l.* and after, on his marriage, gives bond to truſtees to leave 200*l.* to his intended wife at his death; then the marriage takes effect, and the wife being poſſeſſed of a leaſehold eſtate, the huſband, in conſideration of his wife's having joined with him in the ſale and diſpoſition of her leaſehold eſtate, and alſo in conſideration of the delivery up of the bond, by indentures of leaſe and releaſe grants, bargains, ſells, and demiſes his own leaſehold eſtate to truſtees, and their heirs, to the uſe of himſelf and his wife, for their lives, and the life of the ſurvivor of them, remainder to the heirs of the wife, and covenants that he was ſeiſed in fee; then the wife dies without iſſue, but before her death ſhe makes a writing in nature of a will, and thereby deviſes the premiſſes ſo ſettled on her to the plaintiff,

plaintiff, and his heirs; and the plaintiff after got a releaſe
481 from the heir at law of the * wife; the huſband afterwards, on the marriage of his daughter with the defendant *Frank*, enters into articles, whereby he agrees to ſettle and convey the premiſſes on the defendant and his wife, and their iſſue; and the defendant afterwards having notice of the firſt ſettlement, pays off the mortgage, and takes an aſſignment of the mortgage term; and this bill was brought by the plaintiff, as deviſee of the defendant's mother, to have a redemption of the term, and the benefit of the deviſe: the defendant pleaded the articles made on his marriage, and that he was a purchaſer for valuable conſideration, and had no notice of the firſt ſettlement, but would not ſwear this plea; ſo the plea being over-ruled, and his title ſet forth by way of anſwer, as before,

It was now inſiſted for the defendants, that admitting any thing paſſed by the leaſe and releaſe to the mother, under whom the plaintiff claimed, yet that it was only a voluntary ſettlement, and therefore ought not to take place againſt the defendants, who were purchaſers for valuable conſideration, and, as they pretended, without notice, though this was not ſworn.

That the ſettlement was voluntary appeared from its being made after marriage, and the conſideration of the wife's having joined with her huſband in the ſale of her eſtate was nothing, that being only leaſehold; the huſband had abſolute power to diſpoſe of it without her, and therefore her conſent or concurrence no conſideration; and as to the delivery up of the bond, that was now out of the caſe, ſhe dying before her huſband.

But 2*dly*, It was inſiſted, that nothing at all paſſed by the ſettlement, for it being only a term in groſs, no uſe paſſed to the truſtees, by the ſtatute of 27 *H.* 8. which only raiſed an uſe where the perſon was ſeiſed; that by the leaſe for a year, which was only a bargain and ſale, no uſe paſſed, and there was no attornment to veſt it as a reverſion, and the releaſe being

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to inure * upon it, by way of enlargement of eſtate, if nothing paſſed by the leaſe, or if no poſſeſſion was transferred by that, then there was no eſtate whereon the releaſe could operate, and whatever conſideration it might have in equity to create a truſt, could not affect the defendants, who had both law and equity on their ſide; law by an aſſignment of the legal intereſt from the mortgagee, and equity as purchaſers for a valuable conſideration. 482

That beſides, the eſtate ſettled on the mother being only a term for years, the limitation to her heirs was void; and admitting it had been good, yet ſhe was under coverture, and had no power whatſoever to make a will, and conſequently the deviſe thereof to the plaintiff was void; and then the releaſe of his heir at law could have no operation, nor had he any intereſt in him to releaſe; and then the term went to the huſband, he ſurviving his wife, and conſequently this ſettlement on the defendants muſt take place.

That the huſband was alſo the perſon entitled to take out adminiſtration to the wife, and therefore, admitting this ſettlement ſhould paſs the whole intereſt in the term, yet the huſband might at any time take out adminiſtration to his wife, and thereby entitle himſelf to it.

On the other ſide it was inſiſted, that the huſband had actually taken out letters of adminiſtration to the wife; and though he had not the letters of adminiſtration in court, yet it being ſent to the Maſter to enquire whether the lands compriſed in the articles made on the daughter's marriage were the ſame which were mentioned in the mother's ſettlement, (there being ſome reaſon to doubt of it) the court left the plaintiff at liberty to produce his letters of adminiſtration before the Maſter.

And my Lord Chancellor was of opinion, that either by virtue of ſuch adminiſtration, or by the deviſe of the wife operating as an appointment, or by the releaſe of the heir at law of the mother, by ſome, or one of * all thoſe ways, the plaintiff 483

ought

ought to be let into a redemption of the term; for though the ſettlement could not operate as a leaſe and releaſe, yet the huſband being in poſſeſſion, and not the mortgagee, and there being the word *grant* in the releaſe, it took effect as a grant or an aſſignment of his whole intereſt at common law; and though it could not go to the heirs of the wife, yet his intention being plain to exclude himſelf from the whole intereſt of his eſtate, he ſhould not after be admitted to derogate from it; and therefore it ſhould veſt in thoſe in whom by law it might, which was the adminiſtrator of the wife; for as the huſband intended to diveſt himſelf of the whole fee, if it had been a fee, there was no reaſon, when it appeared to be a leſs intereſt, that this ſhould not paſs; and therefore was of opinion, that the defendants ought to aſſign on payment by the plaintiff of the principal and intereſt, but ſent it to a Maſter to enquire as to the value of the lands.

Caſe 303.

11 *February.*

Pinbury and Elkin.

2. Bro. 75.

2 Chan. Caſes, 167. 3 Chan. Caſes, 1. 1 Eq. abr. 192, pl. 9. 1 Vern. 326*. 2 Vern. 38. 324*. 600. 758. (S. C.) 1 Rolls abr. 610. 7. 1 Wms. 98. 198*. 432. 563. (S. C.) 663, and 748. 2 Wms. 421. 686. 3 Wms. 258. 1 Vent. 214. 325. 1 Sid. 450. Barnardiſt. 58. Fitzgib. 68*. 314. 321. Pollexfen, 35. 8 Vin. abr. (tit. Deviſe) 103, pl. 50. 2 Strange, 758. Caſes temp. Talb. 21*. 55. 245. 1 Vezey, 154*. 2 Vezey, 318. 1 Atk. 433. † 2 Atk. 308*. 376*. 3 Atk. 283. 1 Burrow, 272. 6 Brown's Parl. Caſes, 309, and 450*. Brown's Rep. 170*. 187. Fearne's Cont. Rem. 341 to 378.—5 Brown's Parl. Caſes, 435.

The references marked with an aſteriſk, are to authorities in which the deviſe over was held to be void.

A. deviſes all his perſonal eſtate to his wife, provided that if ſhe die without iſſue by me, then 80*l.* ſhall remain to my brother *J. D.* and makes his wife executrix. *J. D.* dies in the life-time of the wife, and after the wife dies without iſſue; Whether this limitation to *J. D.* be good ſo as to entitle his adminiſtrator to it, *Q.?*

A Man by his will deviſes all his goods, chattels, and perſonal eſtate, to his wife *Eſther*, provided, that if ſhe die without iſſue by me, then 80*l.* ſhall remain to my brother *John Davis*, and makes his wife executrix, and dies. *John Davis* dies in the life-time of the wife, and then the wife dies *without iſſue*; and this bill was brought by the adminiſtrator of *John Davis* for the 80*l.* and the only queſtion was, Whether the plaintiff had any title to it upon the words of this will? There was no doubt made, but that if the deviſe over to *John Davis*

† The caſe referred to in 2 Atk. 308, *Beauclerk* v. *Dormer*, particularly merits the attention of the reader, in which Lord *Hardwicke* has pronounced a very elaborate decree, and commented upon the material authorities reſpecting this point.

were good, the plaintiff, as his adminiſtrator, would be entitled to it, † *though he died in the life-time of the wife, the firſt deviſee*; but whether the deviſe over in this caſe was good was the queſtion.

* It was argued that it was; becauſe the dying without iſſue of the wife muſt be intended *dying without iſſue at her death*, and not, *whenever there ſhould be a failure of iſſue of the wife*, which might happen 100 years hence, or more, for that would be a perpetuity, and not to be endured, and therefore, as dying without iſſue has a two-fold meaning, *viz.* either dying without iſſue at the time of her death, or dying without iſſue whenever the iſſue fails, it ſhall not be conſtrued in the remoter ſenſe of thoſe words, but in the neareſt and moſt natural ſenſe thereof, which confines it to the time of her death; and then the deviſe over is good, and conſequently the plaintiff well entitled to it; and a caſe of ‡ *Nicholls* verſus *Hooper* was cited by Mr. *Williams* to that purpoſe. 484 ‡ 1 Wms. 198,

But it was argued on the other ſide, that the conſtruction muſt be made from the import of the words, as they ſtand at the time of the will, and not from any accident after; that her leaving no iſſue at the time of her death was an accident ſubſequent to the making of the will, and therefore of no force to influence the conſtruction of this will; that the words were general, and not confined to the time of her death, and therefore, whenever the iſſue failed, by the import of this deviſe the 80*l.* was to remain over, but *that being unlimited, and tending to a perpetuity of a chattel, was againſt all the rules of conſtruction hitherto allowed, which had never been carried beyond the compaſs of a life, or lives in being*; that it was true, if the deviſe over were good in its creation, the plaintiff would be entitled to it, notwithſtanding the death of *John Davis*, before it actually veſted in him, for though it was but a bare poſſibility, and could not have been granted or aſſigned by *John Davis*, yet it might have been releaſed, or, however, will veſt in his executors or adminiſtrators; but here it

† Vid. Brown's Rep. 119. 181. 298. where this point is amply diſcuſſed.

Was

was void in its creation, and againſt the rules of law hitherto allowed.

485 * My Lord Chancellor took time to look into the will, but ſeemed to be of opinion for the deviſe, and took a difference between a deviſe to one, and the heirs of his body, and that if he die without iſſue then to remain over, and the deviſe in the preſent caſe, which was only to the wife generally, and if ſhe die without iſſue; ‡ that in the firſt a limitation of a chattel over would be void, but in this caſe it was not a deviſe over, but a contingent or condition precedent, which being fulfilled by the death of the wife without iſſue, the deviſe over may take place, as a new original deviſe, not as a remainder; for by the deviſe to the wife generally the whole intereſt was not abſorbed, or taken up, as it was in caſe of a deviſe to her and her iſſue, and therefore, upon the happening of the contingency it might take place: but this was thought by ſeveral to be all one, and would introduce a perpetuity, ſince not confined to the death of the wife, or any time certain; and who muſt have it in the mean time? † *But my Lord would conſider of it.*

‡ Antè, 421.

† See his Lordſhip's decree in favour of the plaintiff, 1 Wms. 564.

*DE 486

Termino Paſchæ,

1718.

In Curia Cancellariæ.

Marks *verſus* Marks. Caſe 304.

1 Eq. abr. 106, pl. 6. S. C. 2 Comyns' Dig. 330. (G.) Fearne's Cont. Rem. 303. 317. 1 Atk. 394. S. C. cited.

William Marks having iſſue three ſons, *William* his eldeſt, *Nathaniel* his ſecond, and *Daniel* his third ſon, and *William* the eldeſt ſon dying in his father's life-time, leaving iſſue only a daughter, the father afterwards by his will, in writing, deviſes the eſtate in queſtion to *Anne* his wife, for her life, and after her death to his ſon *Daniel* and his heirs, provided, that if *Nathaniel* do, within three months after the death of my wife, pay to *Daniel*, his executors or adminiſtrators, the ſum of 500*l.* then the ſaid lands ſhall come to my ſon *Nathaniel* and his heirs. The wife lived ſeveral years after, and during her life *Nathaniel* died, leaving the plaintiff his heir; and the wife dying about two years ago, the plaintiff brought this bill within three months after her death, praying that, upon payment of the 500*l.* he might have a conveyance from the defendants, ſome whereof

A. had iſſue three ſons, *B.* his eldeſt, who died in his life-time, leaving a daughter, and *C.* and *D.* *A.* deviſes lands to his wife for life, and after her death to *D.* and his heirs, provided, that if *C.* do, within three months after the death of the wife, pay to *D.* the ſum of 500*l.* then the lands to remain to *C.* and his heirs. *C.* died in the life-time of the wife, the heir of *C.* ſhall take advantage of this condition, and not the right heirs of the teſtator.

had mortgages upon the eſtate made to them by *Daniel*; and the wife of *Daniel*, by order of court, being admitted to put in her anſwer ſeparately from her huſband, ſhe inſiſted on a ſettlement of thoſe lands: and as between the ſeveral defendants the
487 queſtion * was, which of them had the better title, either to the money, if that were to come in lieu of the land, or to the land itſelf, in caſe the payment could now not be admitted, and that depended on notice, or not notice, of the will amongſt themſelves; but the principal point was, whether this 500*l.* being to be paid by *Nathaniel* within a limited time, and he dying before that time came, whether his heir at law could now, on payment of the money, make a title to thoſe lands, for it was agreed he was not heir at law to the teſtator, but the daughter of the eldeſt ſon;

It was argued, that the whole value of the lands was but about 1000*l.* and that the intention of the teſtator was to divide it equally between his two younger ſons; and that if *Nathaniel* had the lands, he ſhould pay his brother *Daniel* 500*l.* out of it; but whether that payment could be now made, that is, whether it were not too late, and the time lapſed for payment of it by the death of *Nathaniel*, was the ſingle queſtion.

It was argued by Sir *Thomas Powis* and Sir *Robert Raymond* that it was not, and they cited and relied on the text of *Lit.* and the comment of *Coke* thereon, *Co. Lit.* 205 *b.* 219 *b.* that where a feoffment is made to one, and his heirs, upon condition, that if a feoffor do within ſuch a time pay ſuch a ſum of money to the feoffee, *&c.* that though the feoffor die before the day, that his heirs may perform the condition, for the four reaſons therein mentioned, and principally, becauſe a time being limited for the payment of it, and the feoffor dying before the time, as that was the act of God, ſo the feoffee had no wrong done him when the money was paid, whether it were by the feoffor or his heirs; and Sir *Robert Raymond* cited 1 *Chan. Caſes*, 89. and the caſe of *Bertie* and *Falkland*, 3 *Chan. Caſes*, 129. that it was laid down as a rule by my Lord *Somers*, that where the party might be put in as good plight as where the condition itſelf was literally performed, that this court would relieve,

though the letter of it were not ſtrictly * performed, as payment of money, &c. but where the condition was collateral, as in the principal caſe there, and no recompence or value could be put on the breach of it, there no relief could be had for the breach of it. 488

On the other ſide it was argued by Serjeant *Hooper* and Mr. *Mead*, that the caſe in *Co. Lit.* was but in nature of a mortgage; that it was to relieve againſt a forfeiture by non-payment of the money at the day, which may be good, even at law, much more in this court; that there was a wide difference between a condition precedent, and a condition ſubſequent; that that was a condition ſubſequent, and for re-veſting of the eſtate, and the condition deſcended on the heir, and conſequently might be performed by him though not named; that this was a condition precedent, and for the new creation of an eſtate in a perſon who had no right or title before, and was not heir at law; that this was perſonal in *Nathaniel*; that he had not *jus in re*, nor *ad rem*, and could neither have deviſed, releaſed, or extinguiſhed this condition; that it was a bare poſſibility, and he dying before it was performed, his heir could not make it good.

But the Maſter of the Rolls ſaid, this was not a condition at all, becauſe that is only ſuch as may be performed by the party himſelf, from whom it moves, or his heirs; but this in the preſent caſe is to be performed by a third perſon. 2*dly*, This is not in the nature of a remainder to *Nathaniel*, becauſe the deviſe to *Daniel* is not in tail, but in fee; and a remainder can only be after an eſtate tail, or a leſs eſtate; but this being after a fee, is an executory deviſe; it may be called a poſſibility in the largeſt ſenſe of that word, but it is not ſtrictly ſuch, for nothing was veſted in *Nathaniel*, which he could either grant or releaſe, nor did any thing deſcend to his heir; that heirs in this caſe were not named to take by purchaſe, but by deſcent; that the reaſon of their being named was to denote the quantity * of the eſtate which *Nathaniel* was to take, not to give them any eſtate originally, and cited *Lampat*'s caſe, 10 *Co.* and *Brett* and *Rigden*'s caſe, *Plow. Com.* 110. 489

But the counſel inſiſted, that the poſſibility of performing this condition, was an intereſt or right, or *ſcintilla juris*, which veſted in *Nathaniel* himſelf; that he ſurvived the teſtator, and therefore this differed from *Brett* and *Rigden*'s caſe; that conſequently ſuch right, poſſibility, or intereſt, deſcended to his heir, and might be performed by him, as before the Statute *de Donis* the poſſibility of reverter deſcended to the heirs of the donor, and cited *Pureſoy* and *Roger*'s caſe, 2 *Sand.* and the Earl of *Kent*'s caſe, *Cro. Car.* 358. *Pell* and *Brown*'s caſe, *Cro. Jac.* 591. 8 *Co. Matthew Manning*'s caſe, and ſome others, but the caſe being thought a matter of great difficulty, the Maſter of the Rolls appointed them to ſpeak to it again when the court was full.

Afterwards, in *Mich.* Term. 5 *Georg.* 1. it was, by the Lord Chancellor and Maſter of the Rolls, decreed for the plaintiff, on *Lit. ſect.* 334, 335, 336-7. *Co. Lit.* 205, 206-7. and they ſaid, that though a condition was not in ſtrictneſs of law deviſeable, yet ſince the Statute of Uſes the deviſee may take benefit of it by an equitable conſtruction of that ſtatute, and that *Nathaniel* might have releaſed or extinguiſhed his right.

Caſe 305. Hewitt *verſus* Ireland.

Gilb. Rep. 145. S. C. 2 Eq. abr. 139, c. 1. 1 Wms. 426. S. C.

490 ONE *William Stringer* being ſeiſed in fee of an eſtate in right of his wife, and having iſſue only one daughter, who was about the age of 10 years, *Stringer* and his wife enter into an agreement with the plaintiff for the ſale of this eſtate, and that out of the * purchaſe-money 600 *l.* ſhould be ſecured as a proviſion for the wife and her children, and conveyances of the purchaſe-money, ſhould be ſettled in manner following; *viz.* 30 *l.* a year, the intereſt thereof, to be paid the huſband during his life, and after his death to his wife for life, and after their deaths, the intereſt to be paid to ſuch daughter or daughter *as ſhall be begotten between them*, till they ſhall attain their reſpective ages of 21, or be married; and then the principal ſum to ſuch daughter or daughters: but in caſe there ſhall be no daughter, then to the ſurvivor of the huſband or wife. *A.* married the daughter, and in conſideration of this 600 *l.* made a ſettlement on her; the daughter died in the life-time of her father and mother, and ſoon after the mother died without iſſue, the huſband is entitled to it as her adminiſtrator.

Husband and his wife having iſſue one daughter, join in a conveyance of the wife's land, and agree that 600 *l.* part of

were

were executed to the plaintiff accordingly, and the 600*l.* part of the purchaſe-money, was ſecured by way of mortgage in this manner; *viz.* 30*l.* a year, the intereſt thereof, was to be paid to *William Stringer*, the huſband, during his life; and after his death to his wife, for her life; and after their deaths, then the intereſt to be paid to ſuch daughter or daughters as ſhall be begotten between them, till they ſhall attain their reſpective ages of 21 years, or be married; and then the ſaid principal ſum of 600*l.* to ſuch daughter or daughters, equally between them; and in caſe there ſhall be no ſuch daughter or daughters, then to the wife, in caſe ſhe ſhall ſurvive her huſband; but in caſe he ſhall ſurvive her, then to the huſband, his executors and adminiſtrators.

The defendant *Ireland* intermarried with the daughter which *Stringer* and his wife had before this ſettlement, and in conſideration of this 600*l.* made a ſettlement on her; the daughter died in the year 1708, and in the year 1715 the mother died: *Ireland* took out adminiſtration to his wife, and by virtue thereof claimed this 600*l.*; *Stringer* the huſband claimed it, as ſurviving his wife, and there was no other iſſue, ſave only this daughter, which was born 10 years before the ſettlement.

And now the plaintiff brought this bill in the nature of an interpleading bill, that he might know to which of the defendants he might with ſafety pay the money, and it was decreed for the defendant *Ireland*; for it was ſaid it could never be the intent of this ſettlement to provide for daughters which might probably be never *in eſſe*, and in fact, as the caſe has happened, never were *in eſſe*, and to leave a daughter, which was then about 10 years of age, had never done any thing to diſoblige her parents, and was wholly unprovided for, without any proviſion at all; that though the words ſeemed to have * a future relation from the time of the ſettlement, yet the intent was only futurely, as to thoſe which ſhould be begotten at the death of the father and mother; that this daughter came within that conſtruction; that it was like a limitation to one and his iſſue, *procreatis* or *procreandis*; that if it were *procreatis*, it would

* 1 Inſt. Harg. ed. 20 b. and n. 2. 2 Vern. 545. 711. 1 Wms. 231. 2 Wms. 33.

* A limitation to one and his iſſue *procreatis*, takes in thoſe born after to one and his iſſue, *procreandis* extends to thoſe born before.

take in thoſe born after; if it were *procreandis*, it would let in thoſe born before; ſo here *the intention never was to exclude this daughter, and conſequently the defendant, her huſband, is entitled to it; and it was decreed accordingly, with coſts.*

Caſe 306.

Warner *verſus* Hone.

Antè, 164. 1 Eq. abr. 292. S. C. Gilb. Eq. Rep. 146. 3 Chan. Rep. 214. S. C. Brown's Rep. 118. in reſpect of a pecuniary legacy.

A deviſe of a leaſehold intereſt to *A.* and her three ſons, *equally amongſt them, creates a tenancy in common*, though there is no mention of any diviſion to be made.

THOMAS *Gladwin* being poſſeſſed of ſeveral leaſehold houſes for ſeveral terms for years, makes his will, and thereby deviſes his ſaid leaſehold houſes to *Anne* his wife for her life; and after her death, I give and deviſe the ſame to *Alice Bunion*, and her three ſons, equally amongſt them.

And it was decreed, that they took as tenants in common, though there was no mention of any diviſion to be made, or equally to be divided between them; and accordingly the plaintiff, who was adminiſtrator of *Alice Bunion*, and had brought this bill for an account of the profits, had an account of the profits for the time paſt, and that he ſhould be let into a fourth part of the rents and profits for the time to come.

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Caſe 307.

* Atwood *verſus* Atwood.

A wife cannot, either by herſelf or her *Prochein Amy*, bring a *Homine Replegiando* againſt her huſband.

IN this caſe it was held, *per Cur'*, that a wife cannot, either by herſelf or her *Prochein Amy*, bring a *Homine Replegiando* againſt her huſband, for he has by law a right to the cuſtody of her, and may, if he think fit, confine her; but he muſt not impriſon her; if he does, it will be good cauſe for her to apply to the Spiritual Court for a divorce, *propter ſervitiam*; and the nature and proceedings in the writ *de Homine Replegiando* ſhew that it cannot be maintained by the wife againſt her huſband.

Termino S. Trinitatis,

1718.

In Curia Cancellariæ.

Spence *verſus* Allen. Caſe 308.

1 Eq. abr. 232, pl. 3. Gilb. Rep. 150. S. C.

A new ſet of interrogatories allowed to be ſettled before a Maſter, the former being ſuppreſſed, as leading.

IN this caſe interrogatories, and the depoſitions of witneſſes taken on them, had been ſuppreſſed, for that the interrogatories were leading, and then publication paſſed; and now the court was moved, that a new ſet of interrogatories might be drawn and ſettled by a Maſter for the examination of this witneſs, whoſe evidence was very material, and yet muſt be wholly loſt if the court would not indulge them this way; and though the practice has been always againſt it, and it was inſiſted to be of dangerous conſequence, yet one precedent being produced to this purpoſe, and the interrogatories which had been ſuppreſſed were ſuch as might have been drawn by many other counſel, without any apprehenſion of their being leading, the court, to let in the party to the benefit of this witneſs's teſtimony, ordered interrogatories to be put in, and ſettled by a Maſter for his examination over again.

494

Caſe 309.

* Wright *verſus* Pilling.

2 Eq. abr. 613, c. 3. S. C. Gilb. Eq. Rep. 150. S. C. Antè, 310. 2 Wms. 491 to 496. 14 Vin. abr. 356, pl. 4. 2 Vezey, 662.

Whether a judgment creditor may as well ſecure himſelf by buying in a prior incumbrance, as a third mortgagee may by taking an aſſignment of the firſt mortgage.

ONE *Crokroft* being poſſeſſed of a term for years, determinable on the death of his wife, the 16th of *April*, 1694, borrows of the defendant the ſum of 40*l.* and the 18th of *July*, 1704, he borrows of the defendant a further ſum of 83*l.* and gives him a bond for both: in *Hill.* Term, 1704, the defendant obtains judgment on his bond againſt *Crokroft*; but before he had taken out execution, *viz.* 7 *March* following, *Crokroft* mortgages this term to the plaintiff, who was an attorney, and had been concerned for him as ſuch in ſeveral cauſes, and had expended ſeveral ſums of money for him therein, which are mentioned to be the conſideration of the mortgage, and on the 10th of the ſame month purchaſes the equity of redemption; on the 23d of the ſame month, the defendant takes out a *Fi. Facias* on his judgment, and this was ſold thereon by the ſheriff to one *Harriſon*, but this was in truſt for the defendant; after which the defendant having notice that there was an old mortgage ſtanding out, which was made the 21ſt of *July*, 1699, he takes an aſſignment of that mortgage, and alſo takes an aſſignment of a judgment, which one *Sparks* had obtained ſome years before againſt *Crokroft*, and for the mortgage he paid 144*l.* and on the judgment about 30*l.* and the plaintiff brought his bill againſt the defendant, and had a decree at the Rolls to be let into a redemption, on payment only of what he had paid for the aſſignment of the mortgage, for that, as it was held, he could not ſo tack his own judgment, and the judgment of which he had taken an aſſignment, to the mortgage, as to withhold the term from the plaintiff, who had now not only a mortgage, but had alſo purchaſed in the equity of redemption; and the defendant thinking himſelf aggrieved by this decree, did now appeal from it.

And

* And it was argued for him, that he ought to hold this term till both his debts were ſatisfied; ‡ that it was like the caſe of a third mortgagee buying in the firſt; that he ſhould hold out the ſecond mortgagee, till his whole money ſatisfied; that the plaintiff was an attorney, and the whole conſideration of this mortgage and purchaſe was made up of bills of coſts, and buſineſs done; that his deeds, in truth, were antedated, and that there was little or nothing due to him. 495

‡ Vid. Brown's Rep. 93.

On the other ſide it was argued by Mr. *Vernon*, that the difference had always been taken between a general incumbrancer by ſtatute or judgment, and a purchaſer or mortgagee; that the one was no lien on any particular part of the eſtate, but *affected it only at large*, whereas in caſe of a mortgage or purchaſe, the party contracted for that particular part; that if a man had confeſſed 20 judgments or ſtatutes, the laſt could not, by buying in the firſt, hold out all the intervening judgments; which the court agreed to be ſo, becauſe, when the debt on the firſt judgment was paid, that ſecurity determined and expired of itſelf: and Mr. *Vernon* ſaid, he had always taken the courſe to be, that a judgment creditor could not anyways mend or better his ſecurity by taking in a prior mortgage, and cited the caſe of Sir *William Baſſet* to that purpoſe; and he likened it to the caſe of a dowreſs, which muſt take as the law gives it, but a jointreſs contracts for the very eſtate itſelf; that this was but a term for years, and therefore not affected with the judgment till the *Fi. Fac.* lodged in the ſheriff's office, which was not done till the 23d of *March*, long after the plaintiff's mortgage and purchaſe; that this was the ſtronger, becauſe *Crokroft* had not the legal intereſt of the term in him neither; that he had only an equitable intereſt in it at the time of this execution taken out; and though the ſale of the term might in equity paſs that intereſt, yet it ought not to hurt the plaintiff, or hold him out, who was a prior purchaſer; that there was no proof of antedating, nor did * it appear, that the conſideration of the plaintiff's purchaſe was made up as the defendant pretended: but at laſt the defendant offering to go before a Maſter, and to pay him all that 496

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he could prove to have really paid, or to be really due to him, together with intereſt and coſts, the plaintiff was adviſed to comply with it, and to turn his purchaſe into a mortgage, which he conſented to, and ſo the cauſe went off.

‡ 2 Vent. 337. 3 Chan. Caſes, 149. 162.

‡ But my Lord Chancellor, and ſeveral at the bar, ſeemed not to agree to the diſtinction taken by Mr. *Vernon*, but thought a judgment creditor might as well ſecure himſelf by taking in a prior mortgage, as the third mortgagee, for that his judgment was a lien on the land, and when he gets in a prior mortgage, that ought not to be taken from him till payment of his whole debt.

‖ Antè, 295. 2 Eq. abr. 81, c. 4. S. C. and P.

On appeal from the Rolls to my Lord Chancellor, the cauſe is open, and the party is at liberty to read new proof, and offer what he can againſt the decree.

‖ And in this caſe one queſtion was, Whether on the appeal the party might be admitted to read to any thing which he had not before proved on the firſt hearing? And my Lord Chancellor was of opinion he might, for that, as he ſaid, it was to be inrolled as his decree, and the appeal was only to give him an opportunity of hearing what could be offered why he ſhould not inroll it as his decree; and therefore the cauſe was entirely open, and the party at liberty to offer what he could againſt his ſigning and inrolling the decree.

Caſe 310.

Angier *verſus* Angier.

2 Eq. abr. c. 8. S. C. Gilb. Chan. 259. Gilb. Eq. Rep. 152. 2 Atk. 511. 3 Atk. 547. 1 Vezey, 17.

In what caſes a court of equity will decree a wife alimony, though ſhe may have a ſentence for it in the Spiritual Courts.

THE plaintiff brought this bill by her *Prochein Amy*, againſt the defendant her huſband, for a ſpecial execution of articles, whereby the defendant was to allow her 52*l. per ann.* ſeparate maintenance.

It appeared in the cauſe, that the plaintiff brought 1200*l.* portion to the defendant, who was a hop-merchant, and lived in *Southwark*, and was a man of good credit and buſineſs; and ſoon after intermarriage, ſuch * differences aroſe between them, that it became impoſſible for them to live together any longer.

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On the plaintiff's part it was proved, that the defendant had ſeveral times beat and abuſed her, that he had whipped her with a horſe-whip, tore her head cloaths, and denied her neceſſaries.

On the defendant's part it was proved, that the plaintiff was a woman of a moſt perverſe, moroſe, and malicious temper; that ſhe would ſuffer none of the defendant's friends or relations to come to the houſe; that ſhe had oftentimes affronted the defendant's father (who, as it was proved in the cauſe, was a man worth 20000*l.*) and mother; that ſhe did all ſhe could to vilify and expoſe the defendant; that ſhe choſe to wear the dirtieſt cloaths ſhe had; that ſhe would often, when cuſtomers were in the ſhop, take occaſion to come out and aſk for money to buy her bread, although it was proved the defendant kept a very plentiful houſe; that he allowed the plaintiff, even to ſuperfluities; that he had made her preſents of fine cloaths, a gold ſtriking watch, and ſeveral other ornaments; that the plaintiff was addicted to drinking brandy, and other ſtrong liquors, to exceſs; that ſhe was guilty of the moſt provoking diſdainful behaviour poſſible towards her huſband; and that at laſt ſhe left him for about two months, after which ſhe libelled in the Spiritual Court for ſeparation and alimony, and whilſt the cauſe was there depending, the defendant entered into the articles in queſtion with one *Abell*, in behalf of the plaintiff, whereby the defendant agreed to allow his wife 52*l. per ann.* ſeparate maintenance, and to permit her to live where ſhe thought fit, without any moleſtation or diſturbance from him; † but the defendant being † 1 Ch. Caſes, 250. 1 Atk. 272.
deſirous to have his wife home again, and to come to a reconciliation with her, for ſome time had withdrawn the payment of this allowance, which was to be 20*s.* a week; therefore to have the arrears for the time paſt, and the growing rents and payments * during the time of their ſeparation, this bill was now 498
brought.

The defendant inſiſted, the plaintiff was not entitled to the aſſiſtance of this court for carrying theſe articles into execution; that to decree that was to decree a ſeparation, which was the buſineſs only of the Spiritual Court; that alimony continued

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no longer than till they became reconciled, and conſented to cohabit; but if theſe articles be decreed to be executed, no reconciliation afterwards could ſet them aſide; that the wife in this caſe were not at all bound; that the articles were only ſigned by *Abell*, and not by her; and therefore it is unreaſonable that the huſband ſhould be faſt, and the wife looſe.

On the other ſide it was argued, that theſe articles ought to be carried into execution; that they were intended to ſupply the ſentence in the Spiritual Court, and to prevent the charge and trouble of a ſolemn litigation there; that the huſband, by entering into them, had given ſentence againſt himſelf, and could not be charged, even at law, for any debts of his wife's; that the huſband and wife were often conſidered in this court as ſeparate perſons; that though this court could not decree alimony, yet it might decree execution of articles according to the parties' own agreement; and ſeveral precedents had been in this court to that purpoſe, as † Sir *James Oxendon* and his lady, and a caſe of *Catting* and *Catting*, and ſeveral other caſes.

† Antè, 239.

My Lord Chancellor was of the ſame opinion, and ſaid, that to decree an execution of theſe articles was not to invade the juriſdiction of the Spiritual Court; that the intent of theſe articles was to ſave the expence of a ſentence in the Spiritual Court; that if theſe articles could not be decreed here, they would be of no force anywhere; that there was no remedy upon them at common law, for there the wife could not ſue her huſband; that it could not be pretended that the Spiritual Court had any power
499 to decree a performance of * them; that where a huſband makes a ſeparate proviſion for the wife, he is not chargeable by law for her debts; but though that were ſo, yet to avoid the expence he might be put to in defending ſuch ſuits, he ſent it to a Maſter to ſettle a ſecurity to indemnify him againſt the wife's debts, and decreed the arrears and growing payments of the 52*l. per ann.* to be paid to the wife; and ſaid, this was not a decree of alimony, or to decree a ſeparation between them, for that they might, whenever they thought fit, come together again, and then the articles would be no further binding.

Walſam

Walſam *verſus* Skinner.

Caſe 311.

1 Eq. abr. 154. 4. S. C. Gilb. Rep. 153. S. C.

IN this caſe it was agreed by the counſel on both ſides, that an after-born child ſhould come in with the reſt for their cuſtomary ſhare of a freeman of *London*'s perſonal eſtate.

An after-born child of a freeman of London ſhall come in with the others for a cuſtomary ſhare.

2 Vern. 559. S. P.

2*dly*, It was agreed as an undoubted rule, that where a freeman died inteſtate, leaving a wife and children, that one third part of his perſonal eſtate, and the widow's chamber, was to go to the wife, one other third to the children, and the dead man's third to go according to the Statute of Diſtributions; *viz.* two thirds to the children, and the other third to the wife; and that the dead man's third was not at all under the controul of the cuſtom.

The third part of a freeman of *London*'s perſonal eſtate, which he has a power of diſpoſing of, ſhall, upon his dying inteſtate, go according to the Statute of Diſtributions.

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Termino S. Mich.

1718.

In Curia Cancellariæ.

Case 312. Bacon *verſus* Clerk.

2 Eq. abr. 208, c. 1. and 641, c. 9. S. C. 2 Vern. 460. 640, and 657. 760. 1 Wms. 448. 478. (S. C.) 2 Wms. 93. 484. 659. Caſes temp. Talb. 31. 1 Atk. 549. 2 Atk. 354. 3 Atk. 416. 2 Brown's Parl. Caſes, 487.

A. ſeiſed of an eſtate in poſſeſſion, and of a reverſion expectant on the death of *J. S.* deviſes the eſtate in poſſeſſion to his wife for life; and having a ſon and a daughter, he deviſes the eſtate in poſſeſſion, after his wife's death, and likewiſe his reverſion, to his ſon, upon condition that he paid the daughter 1000*l.* within 12 months after the death of *J. D.* and on default, that ſhe may enter. *J. D.* died, living the wife and *J. S.*; on a bill brought by the daughter and her huſband, decreed the portion to be raiſed, though neither of the particular eſtates were determined.

A Braham Clerk, father of the plaintiff and defendant, being ſeiſed of an eſtate in poſſeſſion in *London* and *Middleſex*, and of another eſtate in reverſion in the county of *S.* expectant on the death of *Horatio Herne*, by his will deviſes his eſtate in *London* and *Middleſex* to his wife for life; and after her death, to the defendant his ſon, and his heirs; and alſo deviſes his eſtate in the county of *S.* to the defendant and his heirs likewiſe, from and after the death of *Horatio Herne*, upon condition, nevertheleſs, that my ſaid ſon ſhall pay unto my daughter *Elizabeth* (the plaintiff's wife) the ſum of 1000*l.* within 12 months after the death of *Elizabeth Herne*; and if he does not pay the ſaid 1000*l.* that then my ſaid daughter ſhall enter into my ſaid lands and eſtate in *London* and *Middleſex*, and receive the rents and profits thereof till the ſaid 1000*l.* ſhall be paid. The whole eſtate was about 230*l. per ann.* *Elizabeth Herne* died in 1713, ſoon after the teſtator's death; but the teſtator's widow, and *Horatio Herne*, were both ſtill living.

And

* And this bill was brought to have the reverſion of theſe eſtates ſold forthwith, and the 1000 *l.* paid to the plaintiff, with intereſt, from the death of *Elizabeth Herne*. The cauſe came on only on bill and anſwer; and therefore, although it was ſaid the reaſon of appointing this 1000 *l.* to be paid within 12 months after the death of *Elizabeth Herne* was, becauſe ſhe had an eſtate of 130 *l.* *per ann.* for life, which after her death came to the defendant, yet there being no proof of that, it could have no weight at all in the caſe. 501

For the plaintiff it was urged, that although the eſtates, which were to be the fund for raiſing this portion, were yet but reverſions, yet the portion became due from 12 months after the death of *Elizabeth Herne*; that this was a charge on the eſtate in equity from that time, and therefore it ought to be raiſed by a ſale of the reverſion, and intereſt to be computed from the time it became due; that the clauſe which gave her a power of entering, in caſe it were not paid, was only an additional remedy, and therefore ſhe could not enter whilſt the life eſtates were in being, yet that was not to poſtpone the time of payment of her portion; that if ſhe muſt wait till the two eſtates for life fell, ſhe might never have any portion at all; that this condition being annexed to the deviſe of the eſtate to the heir at law was void at law, but yet it amounted to a charge in equity, and it was uſual to decree a ſale of ſuch reverſions, as has frequently been done of reverſionary terms for years, that children might not be without their portions when they have moſt occaſion for them; that if *Elizabeth Herne* had been ſtill living, although the two life eſtates had dropped, yet the plaintiff could not have demanded her portion, but now *Elizabeth Herne* being dead, although the two life eſtates are ſtill in being, yet her portion is become due.

On the other ſide it was argued, the intention of the teſtator was plain that this portion ſhould not be raiſed till the eſtates fell in; that he had therefore given her a * power of entry, to receive the profits in caſe the portion was not paid, which ſhe could never do whilſt the eſtates for life continued; that the 502

defendant

defendant was heir at law, and by this conſtruction of allowing intereſt, might be ſo loaded as to have nothing left; that the courſe of ſelling reverſionary terms to raiſe portions was new; and my Lord *Cowper* declared, had it been *res integra*, he would not have done it; that therefore it ought to be carried no fur-
† 1 Wms. 448. ther; that a caſe of † *Butler* and *Duncombe* was now under my Lord's conſideration on that very point.

But the Maſter of the Rolls was of opinion, that it was not the teſtator's intention this portion ſhould wait till the reverſions fell in; that the eſtate being deviſed to the heir at law, the condition was plainly void at law, according to *Boraſton*'s caſe, 3 *Co.* 20.; that the eſtates for life being ſtill in being, the daughter had no remedy but in a court of equity to have her portion raiſed; that this amounted to a good charge in equity, and that decrees for ſale had been frequent in the like caſes: and therefore decreed the reverſions to be ſold, and the 1000*l.* to be paid to the plaintiff, with intereſt from 12 months after the death of *Elizabeth Herne*; and ſaid, the clauſe which gave a power of entry was only to be intended in caſe the eſtates for life fell in the mean time, ſo that ſhe might thereby enter, not to delay the payment of the portion till that time †.

Caſe 313.

Anonymous.

Reported under the name of *Harris* v. *Lee*, 1 Wms. 482, and 558. 2 Eq. abr. 135, c. 2. 1 Mod. 129. 1 Lord Raymond, 444. 4 Burrows, 2177.

Though tradeſmen, who truſt a married woman with neceſſaries ſuitable to the degree and quality of the huſband, ſhall recover of the huſband; yet if any perſon lends her money which is actually laid out in neceſſaries, they cannot ſue the huſband; but equity will ſuffer ſuch perſons to ſtand in the place of thoſe of whom ſuch neceſſaries were bought.

IT was agreed in this caſe, that tradeſmen who truſt a married woman for neceſſaries, ſhall recover againſt the huſband, ſo far as the goods taken up appear to be neceſſary, according to the degree and quality of the huſband; but if a man lends ſuch married woman money wherewith to buy neceſſaries, and ſhe * accordingly lays out the money, that the perſon who lent the money has no remedy to recover it againſt

† This decree was afterwards affirmed, upon appeal from the Rolls, by Lord Chancellor *Macclesfield*. 1 Wms. 481.

the

the huſband; and this was agreed to be a ſettled diſtinction in *Scott and Manby*'s caſe, and other caſes; and therefore the plaintiff, who in this caſe had ſupplied the woman with money in her neceſſities, and now brought his bill againſt the executors of the huſband for a diſcovery of aſſets, and a ſatisfaction thereout of his debt, could have no relief on that head, though the utmoſt unkind and cruel uſage of the huſband was proved, and that the money lent was actually laid out and applied for neceſſaries; but yet the Maſter of the Rolls ſaid, the plaintiff ſhould ſtand in the place of thoſe tradeſmen who had ſupplied the wife with neceſſaries, and be let into a ſatisfaction for ſo much as he could prove to have been advanced or delivered to her by them as neceſſaries, as they themſelves ſhould have been if they had been plaintiffs, but for nothing more.

† Lady Pierpoint *verſus* Lord Cheney. Caſe 314.

Antè, 367, and 500, and references.—2 Eq. abr. 642, pl. 10. Gilb. Chan. 274, and 1 Wms. 478. S. C. more accurately ſtated. 2 Wms. 13, and 21. 179. 3 Wms. 1. 3 Atk. 39. Poſt, 583.—See alſo, 1 Wms. 415.

THE Duke of *Kingſton*, on the marriage of his ſon the Lord *Kingſton*, ſettles lands, to the value of about 900*l. per ann.* to the uſe of himſelf for life; remainder to his ſon the Lord *Kingſton* for life; remainder to truſtees for 500 years, with remainder to the firſt and other ſons of that marriage: and the term is declared to be, that in caſe there ſhould be but one daughter, then ſhe to have 10000*l.* for her portion; and if there ſhould be two or more daughters, they to have 20000*l.* to be equally divided between them, and to be paid at their reſpective ages of 21 years, or days of marriage, which ſhould firſt happen; and, in the mean time, to have for their maintenance 300*l. per ann.* till their ages of 12 years, equally between them, * and from thence till their ages of 21, or marriage, 400*l. per ann.* equally between them, the ſaid yearly

A. on his ſon's marriage, ſettles lands on himſelf for life; remainder to the ſon for life; remainder to truſtees for 500 years, for raiſing portions for daughters, payable at 21, or marriage, with maintenance in the mean time, to commence after his or his ſon's death. The ſon has iſſue a ſon and a daughter, and dies: Whether the daughter ſhall have a maintenance out of *this reverſionary term* in the life-time of her grandfather?

† In the above caſe it is ſtated, as if by the words of the act of parliament the maintenance money was to be raiſed out of the rents and profits of the term, and that the plaintiff was for having that extended to a ſale or mortgage by an equitable conſtruction only; whereas this is a miſtake, the words (ſale or mortgage) being expreſsly mentioned in the act. Vid. 1 Wms. 488, (n.)

maintenances to be paid at the four moſt uſual feaſts in the year, the firſt payment thereof to begin and be made at ſuch of the ſaid feaſts as ſhould firſt and next happen after the death of the ſaid duke of *Kingſton*, and Lord *Kingſton*, or either of them. The Lord *Kingſton* had iſſue a ſon, the Lord *Dorcheſter*, and alſo a daughter, and then died.

And now this bill was brought, in the life-time of the Duke, to ſubject this term in remainder to the raiſing the 300*l. per ann.* for the daughter's maintenance till 12, and for the raiſing the 400*l. per ann.* from thenceforth till the portion became payable; and that this might be done by a mortgage of the term, the direction being, *that it ſhould be raiſed out of the rents and profits*, which would, according to the conſtructions in equity in like caſes, *amount to a direction for the ſale or mortgage* thereof, if neceſſary; and for this were cited theſe caſes of ‡ *Gerrard and Wright*, *Cotton and Cotton*, § *Corbett and Maidwell*, and other caſes, where reverſionary terms had been decreed to be ſold or mortgaged for raiſing portions, even in the father's life-time, where the time of payment was come.

‡ 2 Vern. 458. S. C. 1 Salk. 159. S. C. § 2 Vern. 640. S. C. 3 Chan. 190. S. C. 1 Eq. abr. 337, fully ſtated. Caſes temp. T. 33. S. C. cited.

But this was oppoſed, and ſaid, 1*ſt*, That no ſuch direction had ever yet been given for the raiſing of maintenances only, whatever had been done as to the portion itſelf. 2*dly*, That none would advance any money on ſuch a reverſionary term, where the rents could not be immediately ſubject to anſwer the intereſt; or if it could be raiſed, yet the intereſt would ſo far eat into the profits of the eſtate, that it would not be ſufficient to raiſe the portion itſelf when it became due.

My Lord Chancellor ſaid, he was of the ſame opinion with thoſe who had ſat in that court before him, that it was hard to extend the conſtruction on theſe ſettlements to the ſale or mortgage of ſuch a reverſionary intereſt, and that in ſettlements drawn with ſkill, there * was always a reſtriction that it ſhould not be done till the term commenced in poſſeſſion; but ſince there was no reſtriction in the preſent caſe, and yet this was only for raiſing the maintenance and not the portion itſelf, which might, by ſubjecting the term to an immediate mortgage or ſale, be in danger of being very much leſſened or ſunk, he

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ſent it to a Maſter to enquire and ſtate the value of the eſtate, and then to refer to the court for further directions.

‡ Bromfielf *verſus* Wytherley. Caſe 315.

Antè, 49. 1 Vern. 196. 2 Vern. 548. 1 Eq. abr. 398. 8. S. C. 10 Mod. 21. 12 Mod. 560. 1 Salk. 296. 2 Atk. 106. Brown's Rep. 360. S. C. cited, and the diſtinction over-ruled, 375. ib. S. P.

IN this caſe a difference was taken by my Lord Chancellor, that if an executor or truſtee of money places it out in the funds, or on other ſecurity, whereby he gains conſiderably, that he ſhall have the whole benefit thereof to himſelf, in reſpect of the hazard he run of being a conſiderable loſer thereby, which he muſt have borne; but if ſuch truſtee or executor were an inſolvent perſon at the time of placing out ſuch truſt-money, there the *Ceſtuique Truſt* ſhall have the whole benefit gained thereby, as he only could have borne the loſs thereof, if any had happened, the truſtee or executor, by reaſon of his inſolvency, being incapable thereof, and conſequently running no hazard at all.

An executor or truſtee, inſolvent at the time they place out money at intereſt, ſhall, if they make any, pay intereſt, as they run no riſk; *ſecùs* of one who is in good circumſtances.

‡ Under what circumſtances a truſtee or executor ſhall be chargeable with intereſt for money in his hands, vid. 6 Brown's Parl. Caſes, 319, *Earl of Lincoln v. Allen.*

Caſe 316. ‡ Babington *verſus* Greenwood & Ux'.

2 Eq. abr. 721, c. 5. S. C. 1 Wms. 530. S. C. 35. and 722, ibidèm. 2 Wms. 274. 3 Wms. 15, and 123. 3 Atk. 453.

A freeman of *London*, on his intermarriage, agrees with truſtees to add 1500*l.* to the wife's portion, which was 1500*l.* more, to be laid out, within two years after the marriage, in a purchaſe of lands, and ſettled on the huſband for life; remainder to the wife for life, in lieu and bar of her dower and jointure; remainder to their iſſue: this is *no bar of the wife's cuſtomary ſhare.*

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THE plaintiff's father being a freeman of *London*, and having no real, but only a perſonal eſtate, does by articles, in 1694, on his marriage with *Frances* his wife, now the wife of the defendant, in conſideration of 1500*l.* portion, to be paid to the truſtees, covenant, within two years after the marriage, to pay 1500*l.* to the truſtees; and his wife's father covenants likewiſe within the ſame time to pay them 1500*l.* * for his daughter's portion; which two ſums making 3000*l.* are directed to be laid out in the purchaſe of lands, to be ſettled on the huſband for life; remainder to truſtees during his life, to preſerve contingent remainders; remainder to the wife for life, for her jointure, and in bar of dower; remainder to ſuch child or children to be begotten between them, by ſuch proportions, and in ſuch manner as he, by writing or writings, atteſted by three or more witneſſes, ſhould direct; and for want of ſuch direction, to ſuch child or children, equally to be divided between them, and their heirs; and for want of ſuch child or children, to his own right heirs. The marriage takes effect; the two plaintiffs are the only iſſue of that marriage. The huſband, in 1703, by will deviſes 3000*l.* apiece to the plaintiffs, to be paid at 21; and taking notice of his marriage articles, and that a purchaſe and ſettlement had been made purſuant thereto, he confirms that ſettlement, and deviſes the ſame lands to his wife, according to the ſettlement, for life, and after her death to his children the plaintiffs, and gives the reſidue of his perſonal eſtate, except his plate and furniture, to the plaintiffs, for their lives, and in caſe of their deaths, to his wife the defendant, whom he makes executrix, and dies. The wife after his death proved the will, and gave ſecurity to the Chamberlain of *London* for 5649*l.* 9*s.* 7½*d.* being the ſurplus of his per-

‡ Vid. 1 Inſt. Harg. ed. 176 b. to 186 b.; and 4 Burn's Eccleſiaſtical Law, 375, reſpecting the cuſtom of *London*.

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ſonal eſtate; and now the plaintiffs having attained their full age, being about 13 years after the teſtator's death, brought this bill againſt the defendant and his wife, who was the widow and executrix of the plaintiff's father, for an account of his perſonal eſtate, and to have their ſeveral legacies paid them: the defendants by anſwer inſiſted, that the huſband, the plaintiff's father, being a freeman of *London*, ſhe was entitled to her third part, as his widow, by the cuſtom, and whether ſhe ſhould be allowed it or not was the principal point.

* For the plaintiffs it was argued, that the huſband being a freeman of *London* at the time of his making this ſettlement, muſt be ſuppoſed to have in his view, and under his conſideration, the making of ſuch ſettlement as a freeman could make, which, conſidered as ſuch, could be only of his perſonal eſtate, and with regard to the influence he muſt be ſuppoſed to know the cuſtom would have over it at his death, when the ſettlement on his wife was to take place; that this was the ſtronger, in regard it did not appear that he had any real eſtate whatſoever at the making this ſettlement, and therefore it was ſo far a diminution and leſſening of his perſonal eſtate, to make this proviſion for his wife, which ought to be looked upon as a compounding with her for any cuſtomary ſhare thereout: and it was ſaid, that this differed in that reſpect from the caſe of ‖ *Atkins and Waterſon*, where it appeared, that the huſband at the time of the marriage had a real eſtate, and made a ſettlement thereof on his wife, and therefore there nothing was taken out of his perſonal eſtate, as there is in this caſe; and cited the caſe of † *Hancock and Hancock*, where a man covenanted to lay out a ſum of money in the purchaſe of lands, to be ſettled on his wife for her jointure, and in bar of dower, and after the marriage he purchaſed a leaſehold eſtate only, and ſettled it accordingly, and this was decreed, and afterwards affirmed on a rehearing, to be a bar of the wife's cuſtomary ſhare. 507

‖ 1 Eq. abr. 157. S. C. Gilb. Rep. 94. S. C.

† 2 Vern. 665.

But it was argued on the other ſide, that this ſettlement

was only that the wife might be ſure of ſome proviſion in all events; that the cuſtom did not operate on the perſonal eſtate till the freeman's death; that if he ſhould the very day before his death have laid out his whole perſonal eſtate in the purchaſe of lands, and declare expreſsly that it was to prevent the cuſtom operating upon it, that in that caſe the wife would be without remedy; that therefore, ſince it continued perſonal * eſtate to the time of his death, ſhe ought to have the benefit of it; that immediately upon theſe articles the money was to be ſo far looked upon as land, that it muſt go to the wife and iſſue accordingly; that if a purchaſe had not been made, they might have brought a bill in this court to have compelled it; that it was no ways relative to the perſonal eſtate, and therefore could be no bar to any ſhare coming out of the perſonal eſtate; that it might as well be pretended to be a bar of the ſhare on the Statute of Diſtributions, if the huſband ſhould die inteſtate, where he was not a freeman; that real and perſonal eſtate were of two different kinds, and a proviſion out of one had no relation to the other; ‡ that in the caſe of *Atkins* and *Waterſon* it was clearly decreed to be no bar, and though that was a ſettlement of lands, that could make no difference, for the money in this caſe, as ſoon as the articles were executed, was to be looked on as land too: and Mr. *Vernon* cited a caſe of *Platt and Stanton*, where it was decreed by my Lord Chancellor *Cowper*, in *Mich.* Term, 1717, that a proviſion for a child on her marriage, by a freeman, was no bar to any future ſhare ſhe might be entitled to by the cuſtom, no more than it would be to her taking by deſcent or deviſe.

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‡ Vid. 1 Vern. 345. 2 Vern. 753. 1 Vezey, 16. 2 Vezey, 592.

Lord Chancellor was clear of this opinion, that from the time of the articles the money was a debt which the huſband was obliged to pay; that it was no part of his perſonal eſtate from that time, but muſt be looked upon as land, and then it could be no bar of her cuſtomary ſhare of the perſonal eſtate; that the cuſtom did not operate at all till the party's death, and then whatever perſonal eſtate was left was to go according to it.

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There was another point in this caſe, Whether the wife ſhould take *any benefit at all by the will*, ſince now ſhe thinks fit *to claim by the cuſtom*; and a caſe of *Langſton verſus Langſton* was cited, that ſhe ought * not, that ſhe ought wholly to adhere to the will, or wholly to the cuſtom. Antè, 325, and 351. 1 Wms. 722. 1 Atk. 399. 2 Atk. 627. 509

But my Lord Chancellor ſeemed to be clear, that if the will no ways interfered with the cuſtom, but that there was ſufficient, over and above what was given to the wife, to anſwer her cuſtomary part, and the children's, that ſhe might well take, for he might give his own teſtamentary part as he thought fit, and to ſay that the wife ſhould be excluded in that caſe from taking any part of the teſtamentary ſhare deviſed to her, would be to ſay, that he had a power of diſpoſing a third part to any body, provided it were not to his wife and children, which would be abſurd and monſtrous; but it being urged, that there were abundance of precedents to the contrary, it was directed that they ſhould be ſearched before any determination given on this point; and yet it ſeems not at all unreaſonable that the wife, having in all events ſecured herſelf of a proviſion, and of a proviſion too out of the perſonal eſtate, and that before marriage, in reſpect of which the huſband is bound, ſo that, whatever accidents or misfortunes befal him, he has no power or controul over that, not for the payment of debts, proviſion for children, or any other emergency whatſoever; that upon theſe conſiderations the reſt of the perſonal eſtate ſhould be looked upon to be entirely free and exempt from the cuſtom, and the rather, for that if a man before marriage ſettles a jointure out of lands, be it never ſo ſmall, it will totally bar the wife to claim any further jointure, or to have dower out of her huſband's eſtate, though it ſhould be increaſed to many thouſands a year at his death; and why, therefore, ſhould not this proviſion out of the perſonal eſtate bar her likewiſe to claim any further ſhare thereout?

Note; It came on after, on the Maſter's report, when the Lord Chancellor decreed the teſtamentary third to * go towards 510 the

the making up the plaintiffs their legacies 3000*l.* apiece, by virtue of the deviſe of the reſiduum to them; but decreed the plate and furniture to the wife by virtue of the ſaid will, though ſhe had rejected the ſaid will as to her cuſtomary ſhare, which was compared to *Fox* cont' *Edmondſon*, where in ſuch caſe ſhe was even debarred of any freehold eſtate given her by the ſaid will, and to † *Kitſon* cont' *Kitſon*, and other caſes.

† Antè, 351. S. C.

D E

Termino S. Hillarii,

1718.

In Curia Cancellariæ.

Coleman *verſus* Wince.

ſee ante. 407.

Caſe 317.

7 *February.* In court Lord *Macclesfield.*

Antè, 89.

A man mortgages lands, and after borrows more money of the mortgagee on bond; the alinee of the heir of the mortgagor not obliged to pay both the mortgage-money and the bond debt.

THE principal queſtion in this caſe was, Whether, on a bill brought by the purchaſer of lands from the heir at law of the mortgagor to redeem, the mortgagee could retain a bond debt of the mortgagor to his mortgagee, ſo as to oblige the purchaſer to pay both before he redeemed, as without queſtion he might have done upon ſuch a bill brought by the heir at law of the mortgagor before any ſale made?

And it was argued that he might, becauſe the purchaſer deriving under the heir, and ſtanding in his place, could not be in a better condition than he himſelf would have been, if he had been plaintiff, and had brought this bill; and eſpecially ſince, *by the ſtatute againſt fraudulent deviſes, the creditor is at liberty to follow the lands in the hands of the deviſee, as well as againſt the heir himſelf, and the alienation in this caſe was merely voluntary, and the mortgage forfeited at law.*

*But it was held by my Lord Chancellor, and decreed accordingly, that the alienee of the heir might redeem the mortgage, without 512

without paying the bond debt; for though it is true that the heir muſt have paid both in ſuch a caſe, yet the reaſon of that is, becauſe the heir is expreſsly bound, and it is his own debt, ſo that the action upon the bond is brought againſt him in the *debet* and *detinet*; and though by the civil law he may ſubſtitute the lands which he had by deſcent in diſcharge of his perſon, yet he may, if he thinks fit, diſpoſe of thoſe lands, and make his perſon liable; but by our law, before the ſtatute, if *riens per deſcent* were pleaded, the plaintiff could only reply, that he had aſſets by deſcent at the time of the writ purchaſed, for if he had diſpoſed of them before, the plaintiff had no remedy; but now by the ſtatute the plaintiff may reply, that he had aſſets by deſcent before the writ purchaſed at ſuch a time, and if found for him, he ſhall have execution in value againſt the heir, which before he could not have; but he can no more follow the lands in the hands of the alienee, than he can the goods in the hands of the vendee of the executor, for the perſon of the heir is debtor, and not the lands, and conſequently the lands in the hands of the alienee can be charged with nothing but what is an immediate *lien* thereon, which the bond is not; though the lands in the hands of the heir himſelf ſhall be liable, in this caſe, to pay both the bond and mortgage, on a bill brought by the heir for a redemption.

So if a man, poſſeſſed of a term for years, mortgages it, and dies indebted to the mortgagee in a bond debt, if the executor brings a bill to redeem, he muſt pay both, becauſe the equity of redemption of the term is aſſets in his hands; but if he alien the equity of redemption of this term, though he ſhall be anſwerable for the value, as it is ſo far a *devaſtavit*, yet the purchaſer ſhall be charged with no more than was immediately
513 *borrowed upon it; and it was alſo held in this caſe, that the bond creditor of the heir himſelf ſhall be preferred before a bond creditor of his anceſtor, after ſuch alienation made, whether it were voluntary, or for a valuable conſideration.

DE

Termino Paſchæ,

1719.

In Curia Cancellariæ.

Hawkins *verſus* Turner.

Caſe 318.

May 4.

Viner, (tit. Simony) 466 to 469. 1 Jones, 220. Hutton, 111. Cro. El. 180. Cro. Jac. 248. 274. 12 Mod. 505. Watſon, 8vo. 65. Raymond, 175. 1 Syd. 387. 2 Keb. 446. 1 Vern. 131. 411. 2 Chan. Caſes, 186. Comb. 394. 1 Eq. abr. 86. 1 Strange, 227, and 534. 2 Burn's Eccleſiaſtical Law, 341. 1 Vezey, 248. Brown's Rep. 96. Cunningham's Law of Simony.

In court Lord *Macclesfield.*

Though bonds of reſignation are not prohibited by law, yet if they are made uſe of to extort money from the incumbent, or to turn him out for any thing but ill behaviour, or immorality, equity will grant an injunction againſt him.

IN this caſe it was agreed, that a bond given to reſign on requeſt, ſhould not be made uſe of to turn out the incumbent, unleſs for non-reſidence, or ſome great miſdemeanor; nor would the ordinary accept of a reſignation offered by the incumbent, without ſome ſuch cauſe ſhewn; but if the patron made uſe of the bond to extort money from the incumbent, without ſome ſuch cauſe ſhewn, this court would grant an injunction; and a caſe of one *Sands* of *Glouceſterſhire* was cited, and alſo of *Wood* and *Lumly*, before Mr. Juſtice *Blencow*, lately, in the abſence of the Chancellor, where, though the patron had taken a bond to reſign, when his ſon * ſhould be in orders, and qualified, yet having made an ill uſe of the bond ſome time before, the court would not ſuffer him to proceed upon it at law, though they ſeemed all to agree that theſe bonds were not prohibited by the law, ſo far as they were made uſe of only to keep the incumbent to reſidence and good behaviour, and to diſcourage immorality.

Harkneſs

Caſe 319.

Harkneſs *verſus* Bayley.

Antè, 33. 2 Eq. abr. 732, c. 13. S. C. 1 Vern. 97. 141. 182. 2 Wms. 334 ‡.

Lands deviſed to one in fee, and afterwards mortgaged to the ſame *perſon, is a revocation in toto; but if mortgaged to a ſtranger, a revocation quoad the mortgage only.*

RIchard Bayley being poſſeſſed, by way of mortgage, of the remainder of a forfeited term for 2000 years of lands in *Norfolk*, by his will, in 1675, deviſes 1500*l.* apiece to his three younger children, and the like ſum to the child his wife was then enſient with; and if any of his children died before 18, or marriage, their ſhares to go to the ſurvivors or ſurvivor of them, and gave the reſidue of his eſtate, after the payment of his debts and legacies, to his wife *Priſcilla*, and made her ſole executrix, and died; his wife was afterwards delivered of a daughter, who, together with two of the other three children, all died under eighteen, and unmarried, and the defendant was the only ſurviving daughter.

See contra Baxter v. Dyer 5. Ves: Jun: 656. where it is ſtated by L^d. Ch^r. y^t. ye decree in this Caſe is totally miſreported.

Priſcilla the mother, after her huſband's death, purchaſes the inheritance and equity of redemption of theſe lands, in the name of *William Bayley* her ſon, in truſt for her and her heirs; and this inheritance was afterwards conveyed to another, in truſt for the mother and her heirs, who afterwards took a conveyance of the inheritance to herſelf, by which the inheritance ſeemed to be merged; then the mother makes her will, 6th of *June*, 1710, and thereby deviſes theſe lands to the defendant her daughter, and her heirs; and afterwards, for ſecuring 4000*l.* to the defendant, wherein ſhe ſtood indebted to her, for her own and her three ſiſters legacies, and intereſt, and wherewith thoſe * lands by the father's will were chargeable in the mother's hands, the mother, together with her ſon *William Bayley*, join in a mortgage of theſe lands to the defendant the daughter for 500 years, with a proviſo to be void, on payment of 100*l.* *per ann.* to the daughter, during her mother's life, and the 4000*l.* and intereſt within three months after her death.

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The defendant the daughter never executed this mortgage, or any counterpart thereof. This mortgage was made the 29th of

‡ Vid. Douglas, 710, *Doe*, leſſee of Sir *William Gibbons*, Bart. v. *Pott* and others, where it is held, that if a mortgagor deviſes the mortgaged premiſſes, and afterwards pays off the mortgage, and the mortgagee conveys the legal eſtate in truſt for the mortgagor, ſuch a transfer of the legal eſtate ſhall not operate as a revocation of the will.

September

September, 1711, and the mother died the 18th of *March*, 1712. *William Bayley* the brother, being indebted to the plaintiffs in ſeveral ſums of money, due to them by bonds, makes his will, and thereby deviſes all his real and perſonal eſtate, after his debts paid, to the defendant his ſiſter, and her heirs and aſſigns for ever; and there being a deficiency of perſonal aſſets to ſatisfy their debts,

The plaintiffs brought this bill to ſubject theſe lands to a ſale for ſatisfaction of their debts; and the only queſtion was, Whether this mortgage for 500 years to the daughter were a revocation of the deviſe thereof in fee to her by her mother's will? For if ſo, then the inheritance and equity of redemption, ſubject to that mortgage, deſcended to *William Bayley*, and by conſequence was well ſubjected by his will to the payment of his debts: Or if this mortgage ſhould only be a revocation *quoad* the term mortgaged, and the inheritance and equity of redemption continue well deviſed to the daughter by her mother's will, as it was urged it ought, and that the mother's intention in making this mortgage to her was only with deſign to ſecure the 4000*l.* ſhe ſtood indebted to her, not to revoke the deviſe thereof to her in fee?

But it was decreed to be a revocation of the deviſe in fee, being made to ſome perſon, and therefore inconſiſtent with the deviſe, as *Cro. Car.* 49. *Cook and Bullock*'s caſe, though agreed, if the mortgage had been made * to a ſtranger, it had only been a revocation *quoad* the mortgage, and the defendant was decreed to account for the profits from her mother's death. 516

Duke of Bolton *verſus* Deane. Caſe 320.

Antè, 252, and references. 2 Eq. abr. 588, c. 2. S. C. 2 Wms. 644.

IN this caſe a leaſe had been made by ſome of the duke's anceſtors, under whom he claimed, to one *James Deane*, for the life of himſelf, and of *Anne* and *Elizabeth* his two daughters, and the life of the longer liver of them; upon *Deane*'s intermarriage with the defendant his ſecond wife, theſe lands were

In court Lord *Macclesfield*.

A leſſor ſuffers the leſſee to hold the lands after the leaſe is determined; equity will not compel the tenant to account for the meſne profits, unleſs the leſſor was hindered *from entering by fraud or ſome extraordinary accident.*

ſettled

ſettled on her by way of jointure for her life, and they had iſſue a daughter, who was likewiſe named *Elizabeth*; then *James Deane* died, and afterwards his two daughters, being the two remaining lives in the leaſe, died likewiſe, whereby in ſtrictneſs of law that leaſe was at an end; but there being ſtill a daughter named *Elizabeth* alive, the duke's anceſtors, or the duke, made no entry, but concluded the leaſe was ſtill ſubſiſting, and the defendant had held theſe lands under this miſtaken title for ſeveral years; but now, very lately, upon an inſpection into the leaſe, the miſtake being diſcovered, the defendant acquainted the duke with it, and he had poſſeſſion delivered to him, and now brought this bill for an account of the rents and profits from the time of the determination of the leaſe.

Lord Chancellor was clear of opinion, that where one has title of entry, and neglects to enter, or to bring his ejectment, but ſleeps upon it for ſeveral years, that as he has no remedy at law for the meſne profits, ſo neither has he in equity, for it was his own fault he did not enter, and he ſhall never come into a court of equity for relief againſt his own negligence, or to make the tenant in poſſeſſion, who held over his leaſe, to be but his bailiff or ſteward, whether he will or not; but in the preſent caſe, *by reaſon of this circumſtance*, * *of both daughters being of the ſame name, and the miſtake conſequent thereupon*, the defendant was decreed to account for the meſne profits from the time of the expiration of the leaſe; and ſo it would be where any fraud had been uſed to conceal the title from the leſſor, *or in caſe of an infant*; but otherwiſe, generally, where the party has no remedy at law, he ſhall have no relief in equity for the meſne profits, but from the time of an entry made, which he at his peril ought to have taken care of ſo ſoon as his title began.

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Antè, 252.

*D E 518

Termino S. Trinitatis,

1719.

In Curia Cancellariæ.

Lockey *verſus* Lockey. Caſe 321.

Eq. abr. 304, pl. 10. S. C.

In court Lord *Macclesfield.*

An infant who neglects to enter ſix years after he comes of age is as much barred by the Statute of Limitations from bringing a bill for an account of profits, as he is from an action of account at common law.

IN this caſe my Lord Chancellor was clear of opinion, that where one receives the profits of an infant's eſtate, and ſix years after his coming of age he brings a bill for an account, that the Statute of Limitations is a bar to ſuch ſuit, as it would be to an action of account at common law; for this receipt of the profits of an infant's eſtate is not ſuch a truſt as, being a creature of a court of equity, the ſtatute ſhall be no bar to, for he might have had his action of account againſt him at law, and therefore no neceſſity to come into this court for the account; but the reaſon why ſuch bills are brought here, is from the nature of the demand, that they might have the diſcovery of books, papers, and the party's oath, for the more eaſy taking of the account, which they cannot ſo well do at law; but if the infant lies by for ſix years after he comes of age, as he is barred of his action of account at law, ſo ſhall he be of his remedy in this court; and there is no ſort of difference in reaſon between the two caſes †.

† As the above caſe is ſtated in the Regiſter's book, it appears, that the bill was filed 13 years after the infant had come of age, and enjoyed the eſtate, without demanding any account.

‖ Antè, 208. 374. 402. Poſt, 526. 533, and 560. 1 Eq. abr. 48, c. 18. S. C. 1 Vern. 151. 363. 473. 2 Vernon, 455. 1 Wms. 970. 2 Eq. abr. 46, c. 12 and 16. 1 Vezey, 82. 441. Bunbury, 65. Str. 173. 1 Atk. 12. 3 Atk. 2.—Vid. Brown's Rep. 404 §.

An agreement, *though not in writing, being executed on one part, and an enjoyment accordingly, equity will not deſtroy or avoid it, as it has been already carried into execution.*

‖ * Another point was, Whether an agreement, *not in writing, being executed on one part, and an enjoyment accordingly, whether this could be ſo far impeached as to lay the party open to an account for the profits he had received under this enjoyment?* And the court was clear of opinion he ſhould not, for this would be much harder than ſetting aſide the agreement at firſt for want of writing, ‡ which yet, *if executed on one part*, had been always looked upon ſo far concluſive as to induce the court to decree an execution on the other part, not to deſtroy or avoid the agreement, ſo far as it was already carried into execution; and therefore in † *Leiceſter and Foxcroft*, could the party who had built upon the ground, if he had enjoyed the houſes for ſeveral years, have been liable, as a wrong doer, to account for the rents and profits, for want of the agreement's being *reduced into writing?* Moſt certainly he ſhould not ‡‡.

‡ 2 Vern. 627, *ſecùs.*

† 2 Vern. 456.

§ To the above authorities may be added the caſe of *Whitchurch* v. *Bevis*, determined upon a plea, *Hilary* Term, *Feb.* 8th, 1786. As it is ſtill *ſub judice*, for the reconſideration of the court, it is deemed moſt adviſable to decline inſerting it in the preſent publication.

‡‡ It was intended to have added a ſtatement of the above caſe from the Regiſter's book, but the facts are too numerous to be comprized within the ſhort compaſs of a note. Reg. Lib. B. 1718, folio 503.

*DE

Termino S. Mich.

1719.

In Curia Cancellariæ.

Brunſden *verſus* Stratton.

Caſe 322.

Antè, 101. 2 Eq. abr. 52, c. 8. S. C. 260, c. 3. S. C.

A ſettlement made after marriage on the wife and children, purſuant to articles entered into previous to the marriage, though not exactly agreeing with them, not voluntary nor fraudulent againſt bond creditors.

ON the marriage of the defendant, her intended huſband being under age, and ſo incapable of making a ſettlement, the wife's father gave a bond for the payment of 1500*l.* on his making a ſuitable jointure-ſettlement on her, without taking any notice whatſoever of the iſſue; the marriage took effect, and the huſband, ſome years after, on payment of the 1500*l.* made a ſettlement of 147*l. per ann.* or thereabouts, on himſelf for life; remainder to his wife for life, for her jointure; with remainder to their firſt and other ſons, in the uſual form: the plaintiffs were bond creditors of the huſband; and now, after his death, brought this bill againſt the wife and children, to ſet aſide this ſettlement, on pretence the ſame was voluntary and fraudulent, being made after marriage, eſpecially as to the children, for whom no proviſion appeared to be made on the treaty previous to the marriage, and that therefore the plaintiffs ought to be let in for a ſatisfaction of their debts.

 But

But the Maſter of the Rolls was clear in opinion, that this
521 was no fraudulent or voluntary ſettlement, * being but adequate to the wife's fortune, and that the words of the bond were capable of ſuch a conſtruction, for that a jointure-ſettlement muſt be intended a ſettlement in the common form to the iſſue, and a jointure for the wife.

And Mr. *Vernon* ſaid, there could be little doubt of this, ſince
† 1 Eq. abr. 149, pl. 7. the caſe of † *Parſlowe and Weedon*, *Trin.* 1718, where it was held, that though, ſince the ſtatute againſt fraudulent deviſes, a man could not by will deviſe his eſtate to defeat his bond creditors, yet any ſettlement or diſpoſition he ſhould make in his life-time, whether voluntary or not voluntary, would *be good againſt bond creditors*; for that was not provided againſt by the ſtatute, which only took care to ſecure ſuch creditors againſt any impoſition which might be ſuppoſed in a man's laſt ſickneſs; but if he gave away his eſtate in his life-time, this prevented the deſcent of ſo much to the heir, and conſequently took away their remedy againſt him, who was only liable in reſpect of the lands deſcended; and a bond was no lien whatſoever on the lands in his own hands; and if he might give them away to a ſtranger, much leſs can this ſettlement on his wife and children be deemed voluntary or fraudulent as to ſuch creditors; though he ſaid, that till that reſolution he ſhould have been of another opinion, and that ſuch a diſpoſition had been held fraudulent againſt creditors, in the caſe of *Templeman* and *Beke*, tried before my Lord Chief Juſtice *Holt*; ſo the plaintiff's bill was diſmiſſed in this caſe.

Antè, 127, 136. It was likewiſe ſaid by Mr. *Vernon*, ‡ that before my Lord *Nottingham*'s time it was held, that where the lands were deviſed to be ſold for the payment of debts and legacies, that both ſhould be paid *pari paſſu*; but he held that the debts *ought to have a preference*, for that, as he ſaid, he would not make a man ſin in his grave; and ſo it has been held ſince, that the debts in ſuch caſe ſhall have a preference in payment.

‡ In the caſe of *Goſling* v. *Dorney*, 1 Vernon, 482, Lord *N.* is erroneouſly ſaid to have held otherwiſe in Sir *John Bowles*'s caſe, and that Lord Keeper *North* determined that there ſhould be a *preference*. In 2 Vern. 248, *Greaves* v. *Powell*, according to the ſtatement of that caſe, it appears that Lord *N.*'s opinion coincided with Mr. *Vernon*'s obſervation

* Turton *verſus* Benſon.

Caſe 323.

2. Vern. 764. S.C.

Gilb. Chan. 288. 1 Eq. abr. 45, p. 5. (E.) and 88, p. 2. 1 Wms. 496. S. C. Antè, 165, and 267, and references, to which may be added, 1 Vern. 348, and 475. Strange, 240. 3 Wms. 66. 1 Brown's Parl. Caſes, 57, and 60.

A bond obtained in fraud of a marriage agreement, though afterwards aſſigned to a creditor for a juſt debt, ſhall be ſet aſide in equity.

THIS was an appeal from the Rolls, and was but this: The plaintiff on his marriage with the daughter of Mr. *Benſon* was to have 3000*l.* fortune; but the plaintiff's mother being living, ſo that he could make no ſettlement without her concurrence, ſhe, in conſideration of the marriage and portion, joined in making a ſettlement adequate to the fortune; but before the marriage Mr. *Benſon* expreſſing his inability to give ſuch a fortune with his daughter, having other children to provide for, Mr. *Turton* and he came to an agreement between themſelves, that to induce the mother to join in making the ſettlement, the portion ſhould be mentioned to be 3000*l.* but that *Turton* ſhould give him a bond to pay him back 1000*l.* of it at the end of ſeven years, and that in the mean time he ſhould have it without intereſt; and accordingly a bond was given the 29th of *July*, 1710, and then the ſettlement was made, and the marriage proceeded. Before the end of ſeven years Mr. *Benſon* became greatly indebted, to the amount of 10 or 12000*l.* and then died, and the defendant his widow took out adminiſtration, and entered into an agreement with ſeveral of the creditors for the aſſignment of this bond, amongſt other ſecurities, towards ſatisfaction of their debts; and it appeared plainly in the cauſe, that Mr. *Turton* was privy to, and knew of this aſſignment, but now brought this bill to be relieved againſt the bond, and to have it delivered up, as obtained from him in fraud of the marriage contract, and after the treaty had been agreed to, and a ſuitable ſettlement provided for the lady.

The creditors, who had obtained the aſſignment of this bond, likewiſe brought their bill to have the agreement executed, and that they might be at liberty to proceed, in the name of the adminiſtratrix, for recovery of the money due on this bond, and

523 inſiſted * that, whatever conſideration the bond might have had whilſt it continued in Mr. *Benſon*'s hands, or in the hands of his repreſentative, yet now being aſſigned to them, and they being juſt and honeſt creditors, ought to have the benefit of it; that whatever fraud may be ſuppoſed in the obtaining of it, yet it being now aſſigned to them on ſo juſt and valuable a conſideration as the payment of their debts, that had purged the fraud, and would make good the aſſignment.

That though the legal intereſt in this bond could not be aſſigned to them, being a *Choſe* in action, yet by the aſſignment the adminiſtratrix was become a truſtee in equity for them, and therefore they ought to be at liberty to make uſe of their truſtee's name at law for recovery of the money due thereon: and it was likened to the caſe, where a man purchaſes an eſtate of *A.* to which *B.* has right, and he has notice of it, this notice will affect his purchaſe, notwithſtanding any conveyance; but if he after ſells this eſtate to another perſon, who has no notice of *B.*'s right, this ſecond purchaſer without notice ſhall not be affected by it, but *B.* muſt take his remedy as well as he can againſt *A.*; but to make that caſe more directly applicable to the preſent caſe, it was urged farther, that if the firſt purchaſer had ſold it to the ſecond, and only given him a declaration of truſt, ſo that the legal eſtate continued ſtill in him, yet it was ſaid there was no caſe could be produced, wherein relief had been given againſt the ſecond purchaſer in ſuch caſe; that indeed, if the ſecond purchaſer has a conveyance of the legal eſtate, he has them both in law and equity, as he has no notice, and this ſhall prevail againſt *B.*'s bare equity; but even where there is no conveyance, yet it was urged, that his equity ſhould be preferred to *B.*'s, being without notice.

On the other ſide it was urged, that this bond was a mere *Choſe* in action; that it was not aſſignable at law, and that notwithſtanding any aſſignment, yet the legal intereſt and property continued in Mr. *Benſon* and his * repreſentatives; that 524 therefore the creditors could not be in a better condition than he himſelf was: that if Mr. *Turton* had title to be relieved, whilſt

whilſt it continued in his hands, the aſſignment could not take it away from him, or make his caſe at all the worſe: and a caſe was put by Mr. *Vernon*, where a man agreed to ſell his copyhold lands, and made a ſurrender out of court for that purpoſe; but the ſurrender not being preſented within the year, according to the cuſtom, became ineffectual, and in the mean time the perſon who ſold becoming a bankrupt, his creditors inſiſted, that for want of an effectual ſurrender the legal eſtate continued in the bankrupt, and therefore ought to be ſubject to their debts, and the rather, for that they being juſt creditors, as well as the purchaſer, had the advantage of weight on their ſide, by having the legal eſtate; but on a hearing and rehearing by Lord Chancellor *Cowper*, it was decreed, that the creditors could not be in a better condition than the bankrupt himſelf was; that as he might have been compelled to have made good this agreement with the purchaſer, and to have made an effectual ſurrender, ſo muſt his creditors, who ſtand in his place, and derive under him.

Lord Chancellor. † *Bonds of this kind, given in fraud of marriage-contracts, are never to be favoured in a court of equity*; that the relief ſought here againſt the bond is by the party himſelf, who was privy to the fraud, is nothing at all to the purpoſe, for ſo it is in all caſes of this nature, and can be by none but the parties concerned; that here Mr. *Turton*'s mother was plainly impoſed on to conſent to join in a ſettlement for 3000 *l.* which, if this bond ſhould prevail, would ſink a third part of the fortune; that this fraud affected the land *ab initio*, and the aſſignment to creditors cannot mend the caſe, for they can be in no better a condition than the party himſelf, who aſſigned that bond; that if an aſſignment to creditors would alter the caſe, it would entirely put an end to all applications for relief in this * court; that it would then be only to aſſign ſuch a bond as this to juſt creditors, and all would be ſafe; that the creditors having no notice of the conſideration of giving this bond, would not at all help them, for ſuppoſe the bond had been a good one, but part of the money paid, and then it had been aſſigned, as if the whole money had been ſtill due on it, would this affect the obligor? No more, in this caſe, if the bond was liable to be ſet aſide,

† 1 Vezey, 277.

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whilſt it continued in the obligees hand, his aſſignment of it will not alter it, though the aſſignees have no notice of the nature of it; for an aſſignment of a bond is but an agreement, that the aſſignee ſhall have the benefit of all money to be recovered thereon; and if none were due, or that the bond were obtained on an unlawful conſideration, no aſſignment whatſoever can make it better. I think the decree at the Rolls was exceeding right; let the bond be delivered up, and a perpetual injunction againſt it.

See 1 Pow. Cha. Ca. 434.

Note; In this caſe were cited 1 *Salk.* 156, *Kemp and Coleman*, † the caſe of *Duke Hamilton and Lord Mohun*; and Mr. *Vernon* cited the caſe of ‡ *Redman* and *Redman*, where the huſband being conſiderably indebted before marriage, prevails with his brother to give bond for the payment thereof to the ſeveral creditors, and gives him his own bond as a counter ſecurity; the huſband dies, and the brother being forced to pay theſe debts, put his counter bond in ſuit againſt the widow and adminiſtratrix, but ſhe was relieved againſt it in this court. Another caſe cited by him was of § *Gale and Lendo*, where the woman's fortune falling ſhort of what was expected, and ſhe being deſirous the match ſhould go on, prevails on her brother to give her a bond for ſo much as was wanted; the marriage proceeds, the huſband dies, and ſhe took out adminiſtration, and put the bond in ſuit againſt her brother, and though ſhe herſelf was party to the fraud, yet the brother was forced to pay the money, and could have no relief in this court.

† 2 Vernon, 652. S. C.

‡ 1 Vern. 348. 3 Wms. 72. S. C. cited.

§ 1 Vern. 475. 3 Wms. 72. S. C. cited.

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Caſe 324.

20 *November.*

* Sir George Maxwell *verſus* Lady Mountacute his wife.

Antè, 519. Poſt, 533, and 560. Gilb. Chan. 244. 1 Eq. abr. 19, pl. 4. and 20, pl. 5.

At my Lord Chancellor's houſe.

IN this caſe a diſtinction was taken, and agreed by the court, that where, on a treaty for a marriage, or any other treaty, the parties come to an agreement, but the ſame is never reduced into writing, nor any propoſal made for that purpoſe, ſo that they rely wholly on their parol agreement, that *unleſs this be executed in part*, neither party can compel the other to a ſpecific performance, for that the Statute of Frauds is directly

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in their way; but if there were any agreement for reducing the ſame into writing, and that is prevented by *the fraud* and *practice* of the other party, that this court will in ſuch caſe give relief; as where inſtructions are given, and preparations made for the drawing of a marriage ſettlement, and before the compleating of it the woman is drawn, by the aſſurances and promiſes of the man, to perform it, and after to marry him †.

† Ante, 370, and 402. 2 Vern. 200, and 372.

So where a man treated to lend money on a mortgage, and the conveyance propoſed was an abſolute deed from the mortgagor, and a deed of defeaſance from the mortgagee, and after the mortgagee had got the conveyance he refuſed to execute the defeaſance, yet my Lord *Nottingham* decreed it againſt him on the fraud after the ſtatute §.

§ 2 Atk. 98. 3 Atk. 388.

So where an abſolute conveyance is made for ſuch a ſum of money, and the perſon to whom it was made, inſtead of entering and receiving the profits, demands intereſt for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and ‖ *a letter has been held a ſufficient agreement* in writing, if it were ſigned by the party, to bring it out of the ſtatute; and cited the caſe of *Leiceſter* ‡ *and Foxcroft*, and other caſes §§.

‖ 2 Ventris, 361. 1 Vern. 110. 2 Ve n. 332.

‡ Poſt, 560, and 1 Atk. 12, *ſecùs*. Antè, 519. S. C. cited and ſtated.

§§ The above caſe is more amply and accurately ſtated by *Peer Williams*: it is there mentioned, that there was a letter from the huſband, Sir *G. Maxwell* (who was defendant, and not plaintiff, as erroneouſly appears from the above ſtatement) that evidenced the agreement; yet Lord Chancellor *Parker* held the plea of the ſtatute to be valid, and allowed it. 1 Wms. 618. Strange, 236. S. C. See alſo the caſe of *Ayliffe* v. *Tracy*, 2 Wms. 65. where it is held, that a letter from the father to his daughter, by which he agrees to give her 3000*l.* portion, and this not ſhewn to the party, who afterwards married her, does not take the promiſe out of the Statute of Frauds.—Vid. the caſe of *Taylor* v. *Beech*, 1 Vezey, 297.

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Termino S. Hillarii,

1719.

In Curia Cancellariæ.

Caſe 325.

Woodroff *verſus* Wickworth.

Eq. abr. 249. S. C. 2 Vezey, 215.

The grandmother is entitled to a diſtribution of the grandchild's perſonal eſtate, in excluſion of the uncles and aunts.

IN this caſe it was clearly agreed, that the grandmother was next of kin, and entitled to the grandchild's perſonal eſtate, in excluſion of the uncles and aunts; and ſo it has been before ſettled in a caſe of *Welſh* and *Duppa*, and in the caſe of *Blackborough* and *Davies*, 1 *Salk.* 251. and ſo was now again reſolved in the principal caſe.

Antè, 12, &c.

But whether executors ſhould have the ſurplus of the perſonal eſtate to their own uſe, or in truſt for the next of kin, Mr. *Vernon* ſaid nothing was at preſent more looſe and unſettled.

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Termino Paſchæ,

1719.

In Curia Cancellariæ.

Nicholls *verſus* Skinner. Caſe 326.

† Antè, 483. 2 Eq. abr. 346, c. 10. and 364, c. 17. S. C. 1 Wms. 534. S. P. Rem. 358. Fearne's Cont.

At the Rolls. *A.* deviſes portions to his four children, payable at their reſpective ages of 21 years, or marriage; and in caſe any of them ſhould die before the time of payment, or ſhould die without iſſue, then his or their ſhare to the ſurvivor or ſurvivors of them. One of them died under age, and without iſſue; this, though a limitation of a perſonal eſtate, is good, but liable to the contingency of ſurvivorſhip, till it comes to the laſt of the four children.

THE plaintiff's father having four children, and being poſſeſſed of 2000*l.* in the Bank-ſtock, and of other perſonal eſtate, makes his will, and thereby deviſes portions to his ſaid children, to be paid and payable to them at their reſpective ages of 21 years, or days of marriage, which ſhould firſt happen; and in caſe any of them ſhould die before the time of payment, or ſhould die without iſſue, then his or their ſhare to go to the ſurvivors and ſurvivor of them, and his heirs. One of them died without iſſue, under age, and unmarried, and the plaintiff, who was one of the ſurviving brothers, and married, though under age, brought this bill for a third part of the dead brother's ſhare; and the queſtions were,

1*ſt*, Whether upon this will the deviſe in caſe of death without iſſue, being of a perſonal eſtate, were good? 2*dly*, Whether, admitting it were, the dead brother's ſhare were not ſtill liable

† To the references under *Pinbury* v. *Elkin*, (Antè, 483.) add the caſe of *Adolphus* v. *Gordon*, 6 Brown's Parl. Caſes, 354.

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to the contingency of ſurvivorſhip, till it came to the laſt of the four brothers?

529 * His Honour was of opinion, and decreed accordingly, that in this caſe the limitation being to the ſurvivors and ſurvivor of them, and his heirs, that it could not be intended *a dying without iſſue generally, which would make it void*, but *a dying without iſſue, in ſuch manner as that the ſurvivors or ſurvivor might take it, which muſt be during their lives, and conſequently good.* 2*dly*, That it was liable to the contingency of ſurviving, till it came to the laſt, and conſequently the now plaintiff could not have his ſhare of the principal of his dead brother; but in regard no direction was given in the will concerning the intereſt, it was decreed he ſhould have a proportionable part of the intereſt during his life, elſe the intereſt likewiſe muſt lie dead till it come to the laſt, which would be very inconvenient; though in caſes not ſo circumſtanced the legatee has not been allowed the arrears, or growing intereſt, for want of a direction in the will concerning it, but it has fallen into the *reſiduum* of the teſtator's perſonal eſtate.

*DE

Termino S. Trinitatis,

1720.

In Curia Cancellariæ.

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† Buſh *verſus* Weſtern.

Caſe 327.

Vid. the next caſe and references. 2 Eq. abr. 522, c. 3. S. C.

THE plaintiffs had been in poſſeſſion of a watercourſe upwards of 60 years; the defendant claimed the land through which the watercourſe ran, by virtue of a forfeited mortgage for 100 years, and which he had obtained a decree to foreclose; the plaintiff's title was fully proved, and the bill was for a perpetual injunction to quiet the plaintiff's poſſeſſion, which the defendant had interrupted, by making a cut or channel through his own lands, and ſetting up a ſluice at the mouth thereof, whereby the water that ſhould have ran to the plaintiff's watercourſe was totally diverted and prevented.

A man who has been in poſſeſſion of a watercourſe 60 years, may bring a bill againſt a mortgagee, who foreclosed the equity of redemption to be quieted in his poſſeſſion, although he had not eſtabliſhed his right at law.

And though it was objected, that if the plaintiff had any damages, his remedy was purely at law, and that they ought not to come hither till they had eſtabliſhed their title at law;

† That the Court of Chancery will not grant an injunction unleſs the party's right is eſtabliſhed at law, vide 1 Vern. 120. 127. 2 Chan. Caſes, 165. 2 Atk. 302. 3 Atk. 726. 1 Vezey, 476. 2 Vezey, 414.

2dly,

2*dly*, That if they could, yet they ought to have brought thoſe who had the inheritance of the lands, through which the watercourſe ran, before the court, and that it was not ſufficient to have only the mortgagee;

531 * Yet the court decreed for the plaintiff, and agreed it uſual to have ſuch bills in the firſt inſtance in this court, and cited Lord *Aylesford*'s caſe lately, and ſome others; and if the defendant would have had the remainder-man a party, he ought in his anſwer to have ſhewn who that was, that he had only a term for years, and prayed that he might have been made a party; but this he had not done, but inſiſted on his own title under the foreclоſed mortgage; and therefore that objection was over-ruled.

Caſe 328. Duke of Dorſet *verſus* Serjeant Girdler.

2 Eq. abr. 181. 2. S. C. 1 Rolls abr. 383. 1 Vern. 308. 1 Atk. 282. 283. 571. 2 Atk. 392.

A man who is in poſſeſſion of a fiſhery, may bring a bill to examine his witneſſes *in perpetuam rei memoriam*, and eſtabliſh his right, though he has not recovered in affirmance of it at law; *ſecùs*, if he is not in poſſeſſion.

THIS was a bill brought for a commiſſion to examine his witneſſes *in perpetuam rei memoriam*, to eſtabliſh his ſole right of fiſhery; and it was ſuggeſted in the bill, that the defendant pretended a ſole right of fiſhery, and threatened to bring actions, and diſturb the plaintiff when all his witneſſes ſhould be dead.

To this bill the defendant demurred, for that the plaintiff had not verified his title at law, and therefore had no right to bring his bill in the firſt inſtance; but the *demurrer was over-ruled, and this difference was taken and agreed to by the court:*

That if one is out of poſſeſſion, having only right to fiſhery common rent-charge, he who brings ſuch bill ought never to be allowed to do ſo, but a demurrer to it will be good, becauſe he may and ought firſt to enter his action, and eſtabliſh his title at law, otherwiſe publication not being to paſs till after the death of the witneſſes (as in thoſe caſes it never does without ſpecial order of the court) they may be guilty of the groſſeſt perjury, and

and yet go unpuniſhed; beſides that, the party having a remedy at law, the other ſide ought not to be deprived of the opportunity of confronting the witneſſes, and examining them publicly, which has * always been found the moſt effectual method for diſ- 532
covering of the truth.

But if a man is *in actual poſſeſſion*, and is only threatened with diſturbances by another who pretends a right, he has no other way in the world to perpetuate the teſtimony of his witneſſes but by ſuch a bill as this is, for not being actually interrupted or diſturbed, he can bring no action at law; and in ſuch caſe, if this demurrer ſhould be allowed, there is an end of all bills to perpetuate the teſtimony of witneſſes to wills, and ſuch like, wherein the parties pray no relief, nor ought to do, but only a commiſſion for the examination of their witneſſes; and yet, even in theſe caſes, if the plaintiff ſhould afterwards be evicted or diſturbed, theſe depoſitions cannot be made uſe of ſo long as the witneſſes are living, and may be had to be examined before a jury.

But in the preſent caſe, if the defendant had not only threatened to diſturb the plaintiff, but had actually diſturbed him by fiſhing daily (as it was ſaid he did) he ought to have pleaded this, and that the plaintiff ought therefore to ſeek his remedy at law; or if the plaintiff had ſhewn in this bill, that the defendant had actually diſturbed him by fiſhing, then the demurrer had been proper, but not for barely threatening.

That here he had by his anſwer inſiſted on his right of fiſhery, and that he hoped to prove it; and for ſeveral other matters diſcloſed in his anſwer, he inſiſted on his right thereto, and hoped to prove it; and yet by his demurrer would debar the plaintiff from proving any thing at all: and a caſe was cited between *Wynn* and *Hatty*, before Lord Keeper *Wright* at the Inner Temple Hall, where a bill was brought of the ſame nature, touching a common, and the demurrer allowed, becauſe there it appeared, of his own ſhewing, that he was interrupted and diſpoſſeſſed, and therefore had his remedy at law.

Muſſell

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Caſe 329.

* Muſſell and Cooke.

2 Eq. abr. 49, c. 19, and 70, c. 9. S. C. 2 Wms. 308. Bunbury, 135. 5 Vin. abr. 507, pl, 18.—Vid. 3 Burrows, 1921.

A. agrees with *B.*'s broker for 5000 *l.* *South-Sea* ſtock; the broker, according to uſage, made an entry of this agreement in his pocket-book: it being no otherwiſe reduced into writing, is within the Statute of Frauds.

THE 19th of *February* laſt, the plaintiff agreed with one *Green*, the defendant's broker, for 5000 *l.* *South-Sea* ſtock, at 187 *l.* *per cent.* to be delivered about ten days after; and *Green*, as the uſage is, made an entry of this agreement in his pocket-book: at the day appointed the plaintiff attended at the Transfer-Office all day with his money, but the defendant never came, and ſtock being in the mean time conſiderably riſen, the defendant refuſed to transfer it; whereupon, in *April* following, the plaintiff brought this bill for a ſpecific performance of the agreement. Defendant pleaded the Statute of Frauds and Perjuries, that no contract can be good, unleſs reduced into writing.

And it was argued to be a good plea, that if the legiſlature was ſo careful, that no agreement for above 10 *l.* ſhould be binding unleſs reduced into writing, much leſs ought this to be binding which is for ſo much a greater ſum, and thoſe ſtocks were perſonal eſtates.

On the other ſide it was ſaid, that thoſe were not at all within the meaning of the ſtatute; that at the time of making that act, there was no other ſtock in being but the *Eaſt-India* ſtock, and that only for about 300,000 *l.* which was lodged in a very few hands, and but little of it ſold or transferred; ‡ that this entry or memorandum of the broker was the ſame thing as if made by the party himſelf, and by the courſe and uſage in ſuch caſes ought to be allowed a ſufficient evidence in writing of the agreement.

‡ Ante, 526.

In pleading the Statute of Frauds, it is neceſſary to ſay, that the agreement was not reduced into writing.

But my Lord Chancellor ſeemed to be of opinion, that the plea was good, and ſaid that it had been ſo held in many other caſes; but on looking into the plea, he found that he had barely pleaded the ſtatute, without adding, that this agreement was not reduced into writing, as he ought to have done, and ſo had not brought his caſe within the ſtatute, and therefore the plea was over-ruled †.

† 1 Wms. 770.

Note;

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* *Note*; In this caſe, mention was made of the caſe of † *Scould verſus Butter*, laſt Term, where, on a bill for a ſpecific performance of a contract for *South-Sea* ſtock, which was reduced into writing, the Maſter of the Rolls decreed for the plaintiff; but on an appeal to the Lord Chancellor, the decree was reverſed, and the party decreed only to pay the difference; and that to do otherwiſe might be the greateſt hardſhip and injuſtice in the world, as the ſudden riſe of ſtock happened.

† *Cud* and *Rutter*, 1 Wms. 570. 2 Eq. abr. 18, pl. 8.

Greenwood and Brudniſh. Caſe 330.

2 Eq. abr. 461, c. 12. S. C. 3 Wms. 398. 1 Atk. 468.

IN *September*, 1705, *John Sayer* made a mortgage for 160*l.* to one *Biſhop*, the defendants teſtator; in *October*, 1711, *Sayer* died inteſtate, and the plaintiff, without taking out letters of adminiſtration, poſſeſſed herſelf of his perſonal eſtate, and paid it all away in ſatisfying debts on ſimple contract: *Biſhop* died, having made his will, and the defendants executors, who proved the ſame, and were in poſſeſſion of the mortgaged premiſſes; after, in 1718, on looking into ſeveral old papers and writings, the plaintiff found a will of *William Sayer*, the grandfather of the mortgagor, whereby theſe lands were given to his ſon in tail, and on ſearch no fine or recovery appeared to be levied or ſuffered of thoſe lands; they were adviſed the mortgage was not good, and in conſequence thereof *John Sayer*, the plaintiff's eldeſt ſon by her firſt huſband, who was heir in tail, brought his ejectment, and recovered poſſeſſion of the mortgaged premiſſes, whereupon the defendant being thus evicted, and having a bond for performance of covenants in the mortgage-deed, put it in ſuit againſt the plaintiffs.

An executor or adminiſtrator paying away the aſſets in ſatisfying ſimple contract debts, can have no relief in equity againſt a bond debt, *although they had no notice of it.*

And now this bill was brought for an injunction to ſtay the defendant's proceedings at law, on pretence that they had paid away all the teſtator's aſſets before they had any manner of notice whatſoever of this bond, and that the defendant never gave them notice of * it, and therefore they ought not to be chargeable with a *devaſtavit*.

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To this bill the defendants demurred, for that of their own ſhewing it appeared, that aſſets came to their own hands, more than ſufficient to pay and ſatisfy this bond; and that it alſo appeared, by their own ſhewing, that they paid away theſe in ſatisfying debts on ſimple contract, and of an inferior nature, and that was to introduce a courſe of adminiſtration contrary to common law; and the demurrer was held to be clearly good, and the bill rejected as an attempt to alter the courſe of law.

But if any extraordinary fraud had been charged on the defendants, by which the plaintiffs had been deceived or induced to pay away the aſſets, that might have varied the caſe.

Caſe 331.

Clavering's Caſe.

2 Eq. abr. 9, c. 7. S. C. and P. 3 Wms. 402. S. C. but not S. P.

A receiver to the guardian of an infant, who has his account allowed him by the guardian, ſhall not be obliged to account over again to the infant when he comes of age.

THE plaintiff was entitled to ſeveral collieries of conſiderable value, and his guardians or truſtees, during his minority, had appointed one of the defendants to look after and manage the ſame, and alſo gave him a ſalary for ſo doing, which they had at times increaſed or advanced as they ſaw occaſion. The receiver or manager for ſeveral years paſſed his accounts regularly with the truſtees or guardians every half year, and they from time to time paſſed and allowed theſe accounts.

The plaintiff being now come of age, brought this bill, not only againſt the truſtees or guardians, but alſo againſt the receiver or manager, to have a general account of what had been received and paid during his infancy, or, at leaſt, that he might be at liberty to ſurcharge or ſatisfy the accounts. The defendant, the receiver, pleaded the accounts themſelves; and as to him the plea was held clearly to be good, for that he was but ſervant to the guardians or truſtees, and as they had ſufficient authority to employ him, they had the * ſame to diſcharge him, and allow his accounts, and that he had nothing at all to do with the plaintiff.

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That if it were otherwiſe, none would ever be concerned in an infant's affairs; and his plea ſhould be the rather allowed, for

for that the plaintiff was at no ſort of miſchief by it; he was at full liberty to go through the whole account againſt his guardians or truſtees, and they only were reſponſible to him; and they were ſo far reſponſible, that if the ſervant they employed had embezzled or gone away with any ſum of money whatſoever, they muſt have anſwered it to the plaintiff; that the receiver or manager appointed by them was merely their ſervant, and the plaintiff had nothing at all to do with him, but muſt go on againſt his guardians or truſtees, who were only and immediately anſwerable to him.

Anonymous.

Caſe 332.

Eodem Die.

When a bill is exhibited for a general diſcovery of deeds, not neceſſary for the plaintiff to annex the uſual affidavit, that he has them not in his cuſtody.

A Bill was brought for diſcovery of writings, and the defendant demurred, becauſe the plaintiff had not annexed the uſual affidavit, that he had none of them in his cuſtody, but the demurrer was over-ruled; and my Lord Chancellor ſaid, that if on ſuch a bill as this was it ſhould be allowed, it would overthrow half the bills in this court.

That the only caſe where ſuch affidavits were neceſſary was, where the bill was for diſcovery of a particular bond ſuggeſted to be loſt, or for diſcovery of a particular deed, for want of which the plaintiff could not recover his debt at law, or the poſſeſſion in ejectment: in theſe caſes it is fit he ſhould make oath that he himſelf has not the bond or deed, becauſe, if he had, his remedy is proper and open at law; and then he is not to put another to the unneceſſary expence of an anſwer to deny his having it.

*DE

Termino S. Mich.

1720.

In Curia Cancellariæ.

Caſe 333.

Anonymous.

2 Vern. 559. 2 Lev. 32. Ventris, 178. Mod. 77. 7 Vin. abr. 213, pl. 3.

A city orphan cannot by will before 21 diſpoſe of his orphanage part, ſo as to prevent ſurvivorſhip.

IN this caſe were cited a caſe of *Ambroſe* verſus *Ambroſe*, and another of *Rawlinſon* cont' *Rawlinſon*, where it had been certified to be the cuſtom of *London*, and was accordingly decreed by the Lord Chancellors *Harcourt* and *Cowper* ſucceſſively, that if a city orphan dies before 21, his orphanage part ſurvives to the other orphans, and that he can make no diſpoſition by will to contradict it; but if he dies after 21, at which time he might have by will diſpoſed of it there, though he die inteſtate, it ſhall go, according to the Statute of Diſtributions, between his mother and ſurviving brothers and ſiſters; and that in the other caſe the ſurvivorſhip holds only as to the orphanage part belonging to himſelf; for that, if he had by ſurvivorſhip the part of any other of his brothers or ſiſters, that ſhould go according to the Statute of Diſtributions.

1 Vernon, 88. S. P.

And it was alſo ſaid, that if a man married an orphan, yet till 21 his right was not ſo veſted as to prevent his wife's ſhare from

from ſurviving, in caſe ſhe died before 21; though, whether the marriage was before or after 21, * the huſband was fineable, and might be committed, if he had not the licence of the Court of Orphans. 538

Young *verſus* Clerk.

Caſe 334.
November 18.

Antè, 76. Gilb. Chan. 243. 2 Eq. abr. 18, pl. 9. S. C. 1 Vern. 227. 2 Vern. 186. 10 Mod. 503. Caſes temp. Talb. 234. 3 Atk. 383. 21 Vin. abr. 540, pl. 1. 2 Brown's Parl. Caſes, 183. 415, and 535. Brown's Rep. 440. Poſt, 575.

In court Lord *Macclesfield*.

A court of equity will not decree a ſpecific execution of articles, where they appear to be *unreaſonable*, or *founded on a fraud*.

THE bill was to have a ſpecific execution of articles, whereby the defendant had agreed to let the plaintiff a leaſe of the premiſſes for 18 years, at the rate of 67*l.* 10*s.* *per ann.*

The caſe was thus: The plaintiff, for about 20 years laſt paſt, had held the premiſſes, as tenant to one *Thomas Goodhew*, at the rent of 40*l.* *per ann.* *Thomas Goodhew* was entitled to thoſe lands, under a leaſe of 21 years, with power of a reverſal from the Archbiſhop of *Canterbury*; and on his death, which happened about two years ſince, the eſtate came to *Henry Goodhew*, his brother, by virtue of a family ſettlement made the 20th of *December*, 1689; and thereupon his leaſe being determined, he applied to *Henry Goodhew* for a new leaſe; but before a new leaſe was made he likewiſe died, having firſt made his will, and thereby deviſed this eſtate to his daughter, with whom the defendant after intermarried, and thereby in her right became entitled to the premiſſes for the reſidue of the leaſe, with a power of reverſal; and thereupon the plaintiff applied to him likewiſe for a new leaſe, to make up the compleat term of 21 years, which *Thomas Goodhew* had agreed with him for, and of which there was about 18 years to come.

The defendant had never ſeen the land, and knew nothing of the nature or value thereof, and therefore deſired him to conſider it, and come and ſee the lands which lay near *Canterbury*, before he came to any agreement concerning them: it appeared, and was fully proved in the cauſe, that the lands were worth, and were actually let by the plaintiff to under-

tenants at 3*l.* and 3*l.* 10*s.* an acre *per ann.* being hop lands, and the tenants were, by covenants in their leaſes, to plant them
539 and leave them planted with hops, to lay on ſo * many load of dung every year, to bear all pariſh taxes, and to be at other expences, ſo that the plaintiff had 167*l.* *per ann.* coming in by them, without any expence on his part, though he had never paid more than 40*l.* *per ann.* rent to *Thomas Goodhew.*

When the defendant went down to *Canterbury*, he did take a view of the lands in the plaintiff's company, who had promiſed and engaged him to lie at his houſe; but it did not appear that he had any opportunity whatſoever of informing himſelf otherwiſe than from the plaintiff himſelf, who was continually with him, what the value of the lands was, nor had the defendant himſelf any judgment, on a bare view of the lands, what they were worth *per ann.*; but he aſked the plaintiff to let him ſee the counterpart of the leaſes he had made to his under-tenants, which would have fully informed him therein, but that was ſhuffled off, on pretence he could not find them, or that they were left with a friend of his, and ſo the defendant knew nothing of the rent the plaintiff received from his under-tenants, or the terms on which they held the lands; and it was fully proved in the cauſe, that the defendant expreſſed great diſſatisfaction thereat, and was unwilling to come to any articles or agreement with the plaintiff; but by the importunity of the plaintiff, and others then preſent, he was prevailed on to agree to it, and thereupon the articles in queſtion were drawn up and executed between them; after which the defendant diſcovered the impoſition, and that the plaintiff had above 100*l.* *per ann.* clear above the rents he was to pay him, and that without any trouble or expence whatſoever on his part: the defendant on diſcovery of this, and informing himſelf fully of the value and nature of the land, thereupon refuſed to execute a leaſe purſuant to the articles; and to oblige him to it was this bill brought.

Lord Chancellor was clear of opinion, that this court was not bound to decree a ſpecific execution of articles, where they appeared

appeared to be unreaſonable, or founded on a * fraud, or where it would be unjuſt or unconſcionable to aſſiſt them; that from the circumſtances of this caſe, theſe articles were plainly of that ſort; that though there was no direct fraud proved, yet from the † *great undervalue* of the land, and that too without any expence whatſoever on the plaintiff's part, it appeared to him to be an unreaſonable and ſhameful contract; that it was indeed good at law, and therefore left the plaintiff to his legal remedy for recovery of what damages he could by non-performance of the articles, but diſmiſſed the bill as to any ſpecific execution thereof. 540

† Vid. 2 Brown's Parl. Caſes, 396.

Chitton *verſus* Burt.

Caſe 335.

23 *November.*

Gilb. Chan. 314. S. C. † 1 Wms. 678. S. C. and 730. 3 Wms. 324. Caſes temp. Talb. 54. 2 Atk. 437. S. C. cited.—Poſt, 578.

ONE made his will, and thereby deviſed his lands to his ſon, and the heirs of his body, and gave a legacy of 500 *l.* to the plaintiff, upon a contingency which happened within two years after the death of the teſtator: in the mean time the executor had paid away all the aſſets in ſatisfaction of bond debts; and the only queſtion was, Whether the plaintiff, the pecuniary legatee, ſhould be admitted to ſtand in the place of the bond creditors?

In court Lord *Macclesfield.*

A. deviſes lands to his ſon in tail, and 500 *l.* to *B.* to be paid on a contingency; the executor pays away the aſſets in ſatisfying bond debts: the contingency happens within two years after the teſtator's death; yet *B.* cannot ſtand in the place of the bond creditors, ſo as to charge the deviſee of the lands, nor compel the executor to pay it out of his own pocket.

And it was decreed he ſhould not, and that decree now affirmed on a rehearing; for that the teſtator muſt be ſuppoſed to have as great a kindneſs for the deviſee of the lands, as he had for the legatee of the money, and a pecuniary legatee ſhall *never charge a ſpecific deviſee of lands*, even though the lands were ſpecifically deviſed to the heir at law, according to the diſtinction taken in the caſe of ‡ *Herne and Merick*, 2 *Salk.* 416. which was cited as a caſe in point; but if the lands had

‡ 1 Wms. 201. S. C.

† Reported by Peer Williams under the name of *Clifton* v. *Birt*, and much more accurately ſtated.

been left to deſcend to the heir at law, it would have been otherwiſe: but in the principal caſe it would have been much harder ſtill to charge the executor to pay this legacy out of his
541 own pocket, becauſe the * contingency might never have happened, or might have happened ſo many years after, as would make it an exceeding great hardſhip upon him, eſpecially ſince he had duly adminiſtered the aſſets in the mean time, and the accident happening after ought not to be admitted to impeach what was done in purſuance of his duty before.

Caſe 336. † Hartop *verſus* Whitmore.

Antè, 263. 1 Wms. 681. S. C.

A. deviſes to his daughter 300 *l.* upon condition ſhe married with the conſent of her mother; if not, 200 *l.* only: ſhe marries in the life-time of her father and mother, without their conſent, but afterwards the father gives her 200 *l.*; this is a ſatisfaction of the legacy.

A Man by his will gave a portion of 300 *l.* to his daughter, if ſhe married with her mother's conſent; but if not, then 200 *l.* only: the daughter after, in the life-time of her father and mother, married without the conſent of either of them; but the father was afterwards prevailed on to give a portion of 200 *l.* and died ſome time after without any alteration of his will, and the daughter's huſband after becoming a bankrupt, this bill was brought by the aſſignees under that commiſſion to have the 300 *l.* or at leaſt the 200 *l.* given the daughter for her portion by the father's will.

But the bill was diſmiſſed, for that the 200 *l.* given by the father in his life-time was a ſatisfaction of the legacy, and a

† The above caſe is not ſo accurately ſtated by Peer Williams, and although more correctly in this book, yet imperfectly. The words of the will, as taken from the record, are as follows: "I further will, deviſe, give, and bequeath to my daughter *D. W.* 300 *l.* if ſhe ſhould be then living and unmarried, or married by and with her ſaid mother's full conſent firſt had and obtained in writing; but if married when it is appointed to be paid her, and that without her mother's full conſent firſt had and obtained in writing, then, and in ſuch caſe, I hereby will and bequeath her only 200 *l.* and then to be paid her at her age of 23 years." The teſtator appointed his wife, the defendant, executrix. The daughter married *Young*, the bankrupt, in the life of the father, without conſent, (though after a treaty and offer of 200 *l.* portion, which had been refuſed.) The huſband after marriage applied for her fortune; the father offered him 200 *l.* and the defendant *Sarah* ſaid, if ſhe ſurvived her huſband, and had it in her power, ſhe would give her another 100 *l.*; the huſband would not then accept it, but afterwards wrote a letter for it, and it was paid to *Fleming* for his uſe, who gave a receipt for it. *Young* became a bankrupt, and the plaintiff, as his aſſignee, filed a bill for the legacy, which was diſmiſſed. Brown's Rep. 306. (n.)

revocation

revocation of the will, as to that portion, and the 300*l.* was to take place on her marrying with her mother's conſent, which could only be intended after the father's death, and conſequently the legacy never became due at all.

Emblyn *verſus* Freeman. Caſe 337.

I. C. Melmoth's Mſs. R. vol. C. p. 175.

Antè, 31. 162. 2 Eq. abr. 507. 3 Wms. 209. 252. 1 Brown's Parl. Caſes, 372. Brown's Rep. 86.

Joſhua Aylſworth, by leaſe and releaſe, the 20th of *April*, 1713, conveys ſeveral lands to truſtees and their heirs, upon truſt, to ſell the ſame after his death, and out of the money ariſing by ſuch ſale to pay off * a mortgage which was upon the ſame eſtate, and other debts by ſpecialty, and ſeveral other ſums of money to the plaintiffs, and ſeveral others of his relations, and for charities; and after payment thereof, he directed that the overplus of the money ſhould be divided amongſt the plaintiffs, and others, ſhare and ſhare alike, after a ſum of 200*l.* which ſhould be liable to a note, under the hand of the ſaid *Joſhua Aylſworth*, payable to the perſon or perſons therein to be named and directed, the ſaid truſtees to pay the ſaid 200*l.* in ſuch manner and form as ſhould be appointed by the ſaid note.

A. directs that his eſtate ſhould be ſold after his death for ſeveral purpoſes, and, amongſt others, that 200*l.* ſhould be diſpoſed of as he by a note ſhould appoint, and dies inteſtate, having given no directions. This 200*l.* ſhall be a reſulting truſt for the heir at law.

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Joſhua Aylſworth after dies inteſtate, without any diſpoſition of the 200*l.* and the only queſtion now was, Whether the 200*l.* ſhould be diſtributed according to the Statute of Diſtributions? in regard the inteſtate had directed the whole eſtate to be ſold and turned into money, and when that was done, then this 200*l.* was to be ſubject to his appointment; and ſince he had made no appointment, this 200*l.* ought to be looked upon as money, and ſo part of his eſtate, and to be diſtributed to the next of kin.

But it was decreed by the Maſter of the Rolls, and affirmed by my Lord Chancellor, that it ſhould be a reſulting truſt for the heir at law; that no one rule whatſoever was more certain and invariable in this court, than that the heir at law ſhould

have ſo much of the lands as were not actually diſpoſed of; that this 200*l.* not being diſpoſed of, did therefore belong to him, as ſo much of the land itſelf would have done if no ſale were made thereof; and that the caſe of *Roper* cont' *Radcliff* had ſettled this point, and that the heir at law was clearly entitled to this undiſpoſed ſum of 200*l.*; whereupon the decree was affirmed.

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Caſe 338.

* Scudamore & al' *verſus* Scudamore.

Antè, 23, and (n.) 2 Eq. abr. 375, c. 1. S. C.

In court Lord *Macclesfield*.

One deviſes 8000*l.* to be laid out in a purchaſe, and ſettled on *A.* for life; remainder to *B.* and his heirs; but if *B.* dies in the life-time of *A.* then to *C.* and his heirs. *B.* and *C.* both die in the life-time of *A.* the money not being laid out upon the death of *A.* This money ſhall be conſidered as lands, and ſhall go to the heirs of *C.* and not to his executor.

THE Lady *Jane Scudamore*, by her will in 1696, gave the ſum of 8000*l.* to her daughter Mrs. *Prince*, to be laid out by her in a purchaſe of lands, to be ſettled to the uſe of herſelf for life, with remainder to *John Scudamore*, and his heirs; and in caſe he died in the life-time of the ſaid Mrs. *Prince*, to the Lord *Scudamore*, his heirs, executors, and adminiſtrators. *John Scudamore* died in the year 1714, and in the life-time of Mrs. *Prince*. The Lord *Scudamore* likewiſe died in the life-time of Mrs. *Prince*, in the year 1716, having about three months before his death made his will, and the plaintiff his lady executrix, and having given ſeveral legacies to the other plaintiffs, and leaving the defendant *Frances Scudamore*, his only daughter and heir at law, an infant; and in the year 1717 Mrs. *Prince* died, and the money had never been laid out: and now this bill was brought by the plaintiff againſt the Lady *Frances*, heir at law, and againſt the executors of Mrs. *Prince*, to have the money for the benefit of the executors and legatees of the Lord *Scudamore*, and that no purchaſe might be made for the benefit of the defendant, the heir at law of Lord *Scudamore*.

Lord Chancellor was clear of opinion, and decreed accordingly, that the money belonged to the defendant the heir at law, as the lands would have done if a purchaſe had actually been made, as it ought to have been, by Mrs. *Prince* the truſtee; and

and that to decree it otherwiſe would be to put it into her power and election which of the two ſhould have it; for if the purchaſe had been made, it muſt have gone to the heir; but if ſhe, by delaying the purchaſe, may alter the right, and give it to the executors, this would be to make it her will, and not the will of the firſt teſtator, which would be very unreaſonable and inconvenient; and therefore, though the truſt for laying out the money was perſonally * confined to Mrs. *Prince*, without nominating executors, yet they were implied and included in it; and this caſe was the ſtronger, becauſe the heir at law of Lord *Scudamore* was an infant, and as Mrs. *Prince* ſurvived my Lord two years, the infant heir might have brought her bill againſt Mrs. *Prince* herſelf, the truſtee, to have had the purchaſe made, and her laches in not doing it is not to turn to her prejudice, being an infant. The caſes cited were † *Lingen and Souray* in Lord *Harcourt*'s time, and a caſe lately decreed of *Jones* cont' *Powell.*

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An infant not to ſuffer by his laches in not bringing a bill in time.

† Antè, 400. S. C.

Note; In this caſe it was agreed by my Lord Chancellor to be a declared rule in this court, that if money be deviſed to be laid out in the purchaſe of lands, to be ſettled on one and his heirs, that the perſon himſelf, for whoſe benefit the purchaſe was to be made, may come into this court, and pray to have the money itſelf, and that no purchaſe may be made, becauſe none have an intereſt in it but himſelf; but if he dies before the purchaſe made, or payment of the money, ſo that the queſtion comes between his heirs and executors, which of them ſhall have the money, the heir ſhall be preferred, and it ſhall for his benefit be conſidered in a court of equity, as if the purchaſe had been actually made in the life of his anceſtor, for two reaſons: 1*ſt*, Becauſe the heir is to be favoured in all caſes, rather than the executors, who by the old law were to have nothing to their own uſe. 2*dly*, If the executor ſhould have it, it would be againſt the words of the will, which gave it to the heirs.

Kemp

Caſe 339.

Kemp and Kelſey.

Vid. Poſt, S. C. 594. 2 Eq. abr. 267, c. 18. S. C. 1 Wms. 634. 2 Wms. 272. 1 Atk. 63.

Whether a releaſe given by one who marries the daughter of a freeman of *London* ſhall bar the huſband and wife of their cuſtomary ſhare.

THE plaintiff's wife was a daughter of a freeman of *London*, and after her marriage with the plaintiff, her father gave her 100*l.* and her huſband at the ſame time executed a releaſe for the ſaid 100*l.* in full of all his wife's cuſtomary part, or ſhare, which was or might be due to his wife by the cuſtom of *London*, or otherwiſe by her father; her father afterwards made his will, and thereby deviſed to his daughter,

545 the * plaintiff's wife, 400*l.* and made the defendant his own wife executrix, and died, having one other daughter, poſſeſſed of a perſonal eſtate to the amount of 10,000*l.*

And this bill was brought for a diſcovery of the perſonal eſtate, that upon the plaintiff's bringing the 100*l.* into *Hotchpot*, they might be let into a cuſtomary part of the father's eſtate, ſuggeſting ſome fraud in obtaining the releaſe. To this bill the defendant pleaded the releaſe in bar.

And it was argued for the plaintiff, that the very end of the bill being to be relieved againſt the releaſe, it was very extraordinary to plead the ſame releaſe in bar, eſpecially as it was alledged to be obtained by fraud and undue means; that this releaſe could not be any bar in this caſe, being given by the

† 1 Wms. 634. S. C. huſband after marriage; that in the caſe of † *Blundell and Barker*, it was a queſtion, whether a child could releaſe a cuſtomary ſhare, being only a future right, before it became due; and yet that releaſe was by the child itſelf, and before marriage, but here the releaſe is by the huſband, and that too after marriage, which could not bar any future right which could be coming to his wife.

On the other ſide it was argued, that the releaſe was a good bar, or at leaſt, that the direct queſtion was, whether by the cuſtom of the city ſuch a releaſe was a good bar or not; and

and therefore, till the cuſtom be certified to the contrary, the releaſe is, *prima faciæ*, a good bar; that the wife herſelf in this caſe could give no releaſe, being under coverture; that the huſband is entitled to every thing which belongs to the wife, and may releaſe any right or thing in action belonging to her, as he may give away or diſpoſe of her fortune as he thinks fit, if not precluded by his own agreement, the whole power thereof being by law lodged in him; that the ſuggeſtion of fraud in obtaining this releaſe, could not take away the force of it, or deprive them of the benefit of pleading of it, for there it would be but to ſuggeſt fraud in obtaining an award, paſſing an * account, or procuring a releaſe, and the party would be wholly deprived of the benefit thereof; but the contrary of this is every day's experience. 546

Lord Chancellor ſaid, the queſtion in *Barker* and *Blundell* was not, whether the child could releaſe her cuſtomary ſhare, for that he thought clearly ſhe could not, being a mere future right; but whether ſuch releaſe would amount to a compoſition or agreement in bar of her future right, or, as the term is, be a compounding for her cuſtomary ſhare; but in this caſe the huſband had no power whatſoever to releaſe a future right of his wife's; that ſhe might ſurvive him, and would then be entitled to it in her own right; beſides, this releaſe is ſuggeſted to be fraudulently obtained; and therefore ordered the plea to ſtand for an anſwer, with liberty to except, ſo as to have an account of the freeman's perſonal eſtate, and the benefit of the releaſe to be ſaved to the hearing, when the queſtion would come more properly, whether ſuch releaſe by the cuſtom of the city were good or not.

Nicholas and Nicholas.

Caſe 340.

1 Eq. abr. 242, c. 4, 5. S. C. 3 Atk. 207. 333. 628.

THE plaintiff's teſtator by will, among other things, gave two children 500*l.* apiece, and one of them being 14, and the other 16 years of age, applied by their own father to

In caſes in which Chancery and the Spiritual Courts have a concurrent juriſdiction, Chancery will not hinder the Spiritual Courts, being firſt poſſeſſed of the caſe, from proceeding in it.

the

the Court of Arches, and had him appointed their guardian, who thereupon cited the plaintiff, the executor, into the Spiritual Court, and libelled him for ſubſtracting the legacies given to his two daughters; whereupon the plaintiff, the executor, brought his bill in this court, praying that an account may be taken here, and that in regard the legatees were infants, and could not give any legal diſcharge for the legacies, that he might bring it into court to be put out for their benefit; and by this bill offered to bring the money into court, and prayed an injunction to ſtay the proceedings in the Spiritual
547 Court; and on * motion had an injunction, till an anſwer, and further order.

To this bill the defendants, the infants, by their father and guardian, pleaded the whole proceedings in that court, and the pendency of that ſuit before the bill brought.

It was argued by Dr. *Strahan* and Dr. *Sayer*, two civilians, in ſupport of the juriſdicton, that the Spiritual Court has always been allowed to have a concurrent juriſdiction with this court in caſes of legacies ariſing merely out of a perſonal eſtate, as theſe were; that in all caſes of concurrent juriſdictions, which court ſoever was poſſeſſed of the cauſe had a right to proceed, and could not be reſtrained or prohibited by the other court; that this was called in law a prevention of juriſdiction; that it was not only ſo by the civil law, but alſo in all other courts, which had a concurrency of juriſdiction, as between the Exchequer and the Chancery, the Counties Palatine and the Chancery, &c.; that the father in this caſe was a proper guardian, and that he muſt give ſecurity before he can have the children's legacies by the courſe of the courts; that on application, if either he or any of his two ſureties died, or became ſuſpected as to his circumſtances, that the court would oblige them to give better ſecurities; that they could not indeed ſay, that by the courſe of that court the guardian would be obliged to pay intereſt for the legacies, which was urged on the other ſide, as an argument in favour of Chancery, that they will compel him to give ſecurity, but Chancery will do both.

The Spiritual Court cannot oblige a guardian to pay intereſt for the infants money in his hands, though

they would order the money to be put out at intereſt for the benefit of the children; but the civilians inſiſted, that they being firſt poſſeſſed of the cauſe, this court would not injoin them from proceeding to recover the children's legacies.

Lord Chancellor agreed, that in caſe of a concurrent juriſdiction their arguments were juſt, and that this court had a juriſdiction to ſee that the executor, who was but a truſtee, performed his truſt, and that was the juriſdiction this court exerciſed in ſuch caſes; that * if the plaintiff were in earneſt, 548
he ought not only to have offered to bring the money into court, but he ought actually to have brought it, and that had at once put an end to the proceedings in the Spiritual Court; yet his not doing of it plainly proved that his bill was only for delay, and keeping the money in his hands; and therefore ordered the injunction to be diſſolved, unleſs the plaintiff, within ten days, brought the 1000*l.* and intereſt from a year after the teſtator's death, into this court, otherwiſe they were at liberty to proceed againſt him in the Spiritual Court; ſince, if this practice ſhould prevail, he might keep the injunction on foot as long as he pleaſed, and, whenever he had a mind to it, diſmiſs his own bill.

† Mr. *Mead* cited a caſe where this court, the laſt ſeal, granted an injunction to ſtay the huſband's proceedings in the Spiritual Court for a legacy given to his wife, becauſe the court could not oblige the huſband to make an adequate proviſion or ſettlement on his wife, as this court would do, before they would permit him to receive the legacy; and ſaid, the cauſe was ſtronger in reſpect of the ſecurity for the benefit of the infants, which carried intereſt; and that the leaſt ſecurity this court required, was a recognizance, with two ſureties, which affected the land.

† 2 Atk. 420. S. P. Chancery will grant an injunction to ſtay the huſband's proceedings in the Spiritual Courts, for a legacy given to his wife, becauſe that court cannot oblige him to make an adequate proviſion on her.

Caſe 341.

Opie and Godolphin.

2 Eq. abr. 284, c. 2. S. C.

At the Rolls. One who lends money on a ſecurity, which he is adviſed by a lawyer to be a good one, yet if it proves otherwiſe, and he has notice, that another made title to it, he muſt deliver up all the writings relating to it, but not the mortgage deed, for there may be covenants in that for payment of the money.

A Mortgagee for 500 years brought a bill to foreclose, but on proof that he had notice of the plaintiff's title, which was as contingent deviſee of a term for years, on the legatees dying without leaving iſſue behind him, his bill was diſmiſſed; and now the plaintiff brought this bill for diſcovery of writings, and to have the mortgage deed delivered up.

549 * The defendant inſiſted it was hard enough to loſe his money, that the plaintiff ought not to force the writing from him too, eſpecially the mortgage deed, wherein was a covenant for payment of the mortgage money, and wherein poſſibly they might recover in damages; that they had the opinion of a great man (Serjeant *Hooper*) that this deviſe over to the plaintiff was void.

But the court was clear of opinion, that the deviſe over was good, the dying without iſſue being confined to a life then in being, and decreed that the writings ſhould be delivered up to the plaintiff, for that the writings followed the eſtate; but the court would not oblige the defendant to deliver up the mortgage deed for the reaſons before urged.

Caſe 342.

Ex parte Jephſon, Serjeant at Arms.

The nature of the *Serjeant at Arms*'s office, that he muſt return a *non eſt inventus* before a ſequeſtration can go.

THIS was a petition by the *Serjeant at Arms*, that in regard he was an ancient officer of the court, and by the ancient uſe of the court no proceſs of ſequeſtration could iſſue but on a return of *non eſt inventus* by the *Serjeant at Arms*, yet by the late practice, which as it was not introduced above 10 or 15 years ago, committing the parties to the Warden of the *Fleet*, and awarding a ſequeſtration on his return of *non eſt inventus*,

ventus, that might be altered, and the ancient courſe reſtored; for that otherwiſe the *Serjeant at Arms*, by this late method of practice, was deprived of his fees: and a caſe was cited in 1685, in the time of Lord *Jefferies*, where a man that was committed to the *Fleet* for not performing a decree, and after made his eſcape, and got into *Holland*, as appeared by affidavit, yet the court would not grant a ſequeſtration upon return of *non eſt inventus* by the Warden of the *Fleet*, but awarded a proceſs to the *Serjeant at Arms*, to take him upon the return of *non eſt inventus*, and then a ſequeſtration to go.

* It was urged, the late practice to the contrary was an innovation, and ought to be altered; ſo where the defendant had time given him to put in his anſwer upon entering his appearance with the Regiſter, which was a practice introduced about 20 years ago, and was for the expedition of the ſuitor in ſhortening the proceſs, the courſe was, on the expiration of the time, to move that he might anſwer in four days, or ſtand committed, upon which method of proceeding, as it was alledged, no ſequeſtration could iſſue till a return of a *non eſt inventus* by the *Serjeant at Arms*, and not ſuch a return by the Warden of the *Fleet*. 550

That this commitment to the *Serjeant at Arms* was no greater expence to the ſuitor than when the commitment was immediately to the *Fleet*; that if he obeyed the order, whilſt in cuſtody of the *Serjeant at Arms*, there was no farther proceedings againſt him; if he did not, the *Serjeant at Arms* was the officer of this court that was to ſend him to the *Fleet*.

That this was his proper office, to ſearch and find out the contemners of this court; and the Warden of the *Fleet*, whoſe office it was to attend at the *Fleet*, and take care of priſoners ſent thither, was not to be ſuppoſed to be abſent from thence, or to take them immediately into cuſtody, but as they were brought to him by the proper officer.

That it was true, in caſe of contemptuous words, or for a contempt in aſſaulting or ſtriking any who ſhall ſerve the proceſs

ceſs of this court, the commitment was immediately to the *Fleet*; but the reaſon of this was, becauſe the commitment in that caſe was in nature of a final execution; that no proceſs of ſequeſtration was to go upon it, but he was to anſwer the interrogatories, and clear his contempt, and pay the coſts, which was the puniſhment he was to undergo, and the only one in that caſe, and ſo for not bringing writings into court; but that wherever a ſequeſtration was to go, there muſt be firſt an order
551 for commitment to the *Serjeant* * *at Arms*, and upon his return of *non eſt inventus*, then the ſequeſtration to iſſue, and conſequently the commitment immediately to the *Fleet*, after which the order for entering his appearance with the Regiſter was not only unneceſſary, but a burthen to the ſuitor.

My Lord Chancellor ordered the Regiſter to look into precedents, and to certify to him how the practice had gone; but ſaid, that if the *Serjeant at Arms* was entitled by the ancient courſe to a fee by the caption in theſe caſes, that it could not be altered without an act of parliament: that though he approved very well of ſhortening the proceſs of the court, yet the queſtion was concerning the diverting of the proceſs of the court, Whether it ſhould go to the *Serjeant at Arms*, or to the Warden of the *Fleet?* for the proceſs was not at all ſhortened by it, but a wrong done to the *Serjeant at Arms*.

That in caſe of entering an appearance with the Regiſter, no wrong was done to any one more than another; that the courſe was formerly to grant an attachment, then a proclamation, then a commiſſion of rebellion, then a *Serjeant at Arms*; but that by the late practice of entering his appearance with the Regiſter before any of thoſe proceſſes awarded, or at any time after, and before the laſt proceſs for a commitment, every thing was admitted to be right, and he was ſuppoſed to be in court, ſo as to ſtand committed, if he did not anſwer in four days after the time expired; and the Warden of the *Fleet* being in court, inſiſted, that the entering his appearance with the Regiſter prevented the neceſſity of any previous order for his commitment, even to the

the *Serjeant at Arms*, but this was not clearly agreed; but as to the other proceſs, precedent to the commitment to a *Serjeant at Arms*, it was clearly agreed to be cut off by his entering his appearance, and this my Lord ſaid was no injury to any one, becauſe none of the preceding proceſs iſſued at all, and conſequently could not iſſue to a wrong perſon; and ſaid, it would be the ſame too, even in the caſe of the *Serjeant at Arms*, * if the courſe of the court ſhould be certified to be, that no proceſs to him was neceſſary, but that the commitment might be immediately to the *Fleet* on his not anſwering within the time, after entering his appearance with the Regiſter; but whether that was the courſe or not, was the principal queſtion, and concerning which my Lord would be attended with precedents. 552

It was ſaid, in this caſe, that the practice of granting ſequeſtrations was very ancient; and the Warden of the *Fleet* ſaid, he had a table of fees as ancient as 3 *Eliz.* which were the fees for each day's proceeding in the ſequeſtration; but it was agreed by the court, that at firſt the ſequeſtration was only to ſequeſter the thing in demand, but that for ſome ages paſt it has been extended alſo to the goods and chattels of the party.

It was likewiſe ſaid, that by a *Cepi*, returned by the ſheriff of the county, the party was to be brought up and committed to the *Fleet*, by order of the court; if he did not appear and anſwer, the bill was to be taken *pro confeſſo*, and to bring him on a *Cepi* returned, the ſheriff was to be amerced, or an order to be made for a meſſenger to go to him.

Afterwards, *Saturday* 13th of *May*, 7 *Geo.* the following order was made:

ORDO CURIÆ.

Ex parte Servient' ad Arma.

" WHEREAS the *Serjeant at Arms* attending the Right " Honourable the Lord High Chancellor of *Great* " *Britain*, on the 18th day of *February* laſt preferred his hum-

" ble petition to his Lordſhip, ſetting forth, that by the ancient
" rules and practice of this court, the *Serjeant at Arms* is en-
" titled to take all perſons into cuſtody, who ſtand in contempt
" to a commiſſion of rebellion, returned *non eſt inventus*, but
553 " that * the court hath of late for contemners not appearing to
" be examined on accounts before the Maſters of this court,
" not producing writings, and other contempts, granted orders
" of commitment, without iſſuing forth the uſual proceſs againſt
" them; and that the court of late frequently gave defendants
" further time to anſwer, on entering their appearances with the
" Regiſter; and that thereupon, for not anſwering at the time
" limited, commitments have been granted, and the ſaid ſeveral
" orders of commitment have been executed by the Warden of
" the *Fleet*, or elſe he has made return *non eſt inventus*; here-
" upon ſequeſtrations have been obtained contrary to the ſaid
" ancient rules and practices, by which means the proceſs of
" this court is now rarely carried on by a *Serjeant at Arms*, and
" he is thereby deprived of great part of his fees and profits
" belonging to his office: and the ſaid petition coming to be
" heard before his Lordſhip on the 18th day of *March* laſt, in
" preſence of Mr. Solicitor General, Mr. *Lutwich*, and *Mead*,
" of counſel for the *Serjeant at Arms*, and Mr. *Cowper*, and
" Mr. *Williams*, of counſel for the Warden of the *Fleet*, upon
" hearing of the ſaid petition read, and what was alledged on
" either ſide, his Lordſhip ordered, that precedents relating to
" the matters aforeſaid ſhould be laid before him; and counſel
" again this day attending him, upon hearing ſeveral precedents
" read, and what was further alledged on either ſide, declared,
" that no ſequeſtration can regularly iſſue to ſequeſter the eſtate
" of any perſon who cannot be found, but upon the return *non*
" *eſt inventus* of the *Serjeant at Arms*; and doth therefore order,
" that from thenceforth, where any perſon is in contempt,
" either for want of an appearance or anſwer, or for not yield-
" ing obedience to any order of this court (unleſs it be for
" contemptuous language, or the beating and abuſing any perſon
" in the ſerving the proceſs of this court, or other contempts of
" the

" the like nature) the *Serjeant at Arms*, attending this court,
" * do apprehend and bring the contemner to the bar of this 554
" court, to anſwer ſuch contempt; but if the contemner can-
" not be found, then to return *non eſt inventus*, to the end a
" ſequeſtration may regularly iſſue, according to the ancient
" rules and practice of this court, and that proceſs do for the
" future iſſue accordingly; and that it may be made a part of
" all orders for giving time to anſwer, or for doing any other
" act, upon the party's entering his appearance with the Regiſter,
" that the party, when he enters ſuch appearance, do likewiſe
" conſent that a *Serjeant at Arms* do go againſt him, as upon a
" commiſſion of rebellion returned *non eſt inventus*, in caſe of
" non-compliance; and that this order be hung up in the Re-
" giſters and Six Clerks offices of this court, that all perſons
" may take notice thereof, and yield obedience to the ſame.

" *Edward Goldſborough*, Dep. Regiſter."

DE Termino S. Hillarii, 1720.

In Curia Cancellariæ.

Caſe 343. **Earl of Strafford *verſus* Lady Wentworth.**

8 *February.*

1 Wms. 180. S. C. (n.) 392. 4 Bacon's Abr. (tit. Rent)†.

In court Lord *Macclesfield.*

Tenant for life makes a leaſe for years, reſerving rent at *Lady-day* and *Michaelmas*, and dies on *Michaelmas-day*, about 12 o'clock at noon; the rent ſhall go to his executor, and not to the remainder-man; but if ſuch tenant had a power of leaſing, and had died in manner aforeſaid, the rent, in reſpect to the continuance of the leaſe, muſt have gone to the remainder-man, as incident to the reverſion.

SIR *Henry Johnſon* was tenant for life, with remainder to the Lady *Wentworth*; Sir *Henry* made leaſes for years, reſerving the rent at *Lady-day* and *Michaelmas*, by half yearly payments, and died on *Michaelmas-day*, about 12 o'clock at noon; and the queſtion was, Whether theſe rents belong to the plaintiff his repreſentative, who had taken out adminiſtration to him, or whether they ſhould go along with the land to Lady *Wentworth*, in remainder; or whether the tenants ſhould have the benefit of retaining them in their own hands, as belonging neither to the plaintiff or defendant?

The caſe was opened and debated by the Attorney and Solicitor-General for the plaintiff; but before any others had ſpoke to it, it was ſent to a Maſter to ſtate the ſeveral facts as to the leaſes;

† Vide Stat. 11 *G.* 2. cap. 19. ſect. 15.

that

that is to ſay, what leaſes had been made by Sir *Henry* as to the part of the eſtate whereof he was ſeiſed in right of his lady, what leaſes as to that part whereof he was tenant for life, and * what power was reſerved by his marriage-ſettlement to make leaſes; and what leaſes were made by parol, and what in writing; and whether in purſuance of his power, or whether by virtue of his intereſt. 556

But my Lord Chancellor declared, that if tenant for life makes a leaſe for years, reſerving rent at *Lady-day* and *Michaelmas* during the term, and dies on *Michaelmas* or *Lady-day* at 12 o'clock, or any other time before the laſt inſtant, that the rent in ſuch caſes is nevertheleſs due to his repreſentative; for though the leſſee had election to pay it any time before the laſt inſtant of thoſe days, if this leaſe had ſo long continued, yet it being payable on thoſe days during the term, and the leſſor being living ſome part of thoſe days, his election to defer it to the laſt inſtant was taken away by ſuch dying, before the rent became completely due, and conſequently it would belong to the repreſentatives of the leſſor; and this, he ſaid, was ſo clear, that he would no more ſend it to be determined at law, than he would, whether the father's eſtate ſhould deſcend to the eldeſt ſon; for the term having a continuance ſome part of thoſe days, the leſſee at his peril ought to pay his rent before the expiration of the term, it being payable on thoſe days during the term, and the term did ſubſiſt on thoſe days, though not to the laſt inſtant.

And this was the caſe of the Lady *Cale*, in the Northern Circuit, in the late King *William*'s reign, wherein Mr. Juſtice *Tracy* took the advice of the judges, and gave his opinion accordingly; that where the leſſor, tenant for life on ſuch a reſervation, died about ſix o'clock in the evening, that the rent was become completely due, and belonged to his executor, elſe he himſelf could not give a proper diſcharge for it till the laſt inſtant, which moſt certainly he may at any time of the day whereon it is payable, and this does not at all contradict *Baſkerville* cont' *Mayo*, in *Saund.* 282.

557 * But if ſuch leaſe were made, by virtue of a power to make leaſes in a ſettlement, as the term ſubſiſted, and had continuance there by the death of the leſſor before the laſt inſtant, the rent would go along with the land to him in remainder, or reverſion; becauſe being payable on thoſe days during the term, the leſſee had till the laſt inſtant of thoſe days to pay his rent, the term enduring till the laſt inſtant of thoſe days, and conſequently the leſſor dying before it was completely due, his repreſentatives can make no title to it; and ſo, he ſaid, if ſuch leaſe were only an equitable leaſe, that is, ſuch a leaſe as ought to be made good in a court of equity, though it were in ſome circumſtances defective in the execution of it, and not ſtrictly purſuant to the power; and in thoſe particulars my Lord Chancellor was clear, and ſaid, there could be no manner of doubt of them.

Afterwards this cauſe came back upon the Maſter's report, to whom it was referred to ſettle the nature of the ſeveral leaſes made by Sir *Henry Johnſon*; and upon his report it appeared, that ſome of them were made by him generally, and thoſe determined on his death; others were made by virtue of a power for making leaſes, and thoſe ſtill continued; and my Lord was clear of opinion, that as to leaſes of the firſt ſort, the rents belonged to his executors, becauſe, though for the benefit of the tenants they had till the laſt inſtant of *Michaelmas-day* to pay the rents, yet the reſervation being at *Michaelmas-day*, and *Lady-day*, conſequently ſo ſoon as either of thoſe days began, they were, at their peril, to take care that they were paid accordingly, becauſe they were then actually become due to Sir *Henry Johnſon*, who made the leaſes, and his right to the rent became actually veſted in him.

But as to the leaſes made by virtue of the power, they ſtill had exiſtence and continuance after the death of the leſſor, in the ſame manner as they had during his life, and therefore the
558 tenants had till the laſt inſtant * of thoſe days to pay the rents; and then, when the leſſor died before, the rent goes along with the reverſion, to thoſe who are entitled to it.

Lady

Lady Shaftſbury's Caſe.

Caſe 344.

2 Eq. abr. 516, c. 7. 691, c. 2. S. C.

THE Lady *Shaftſbury* being entitled to 800*l. per ann.* jointure, and, on the decree and Maſter's report, 600*l. per ann.* being allowed for the young Earl of *Shaftſbury*'s maintenance and education, one Mr. *Wych* was appointed receiver of the rent of the eſtate, and to make the payment of both theſe annuities to the Lady *Shaftſbury*. Mr. *Nichols* in *Fleet-ſtreet* was Mr. *Wych*'s goldſmith, where he kept his own caſh: Mr. *Wych* waited on the lady to know where ſhe would be pleaſed to have the money as it was received, and mentioned to her both Sir *Robert Child* and Mr. *Nichols*; but the lady ſaid, Mr. *Norcort* was the banker, at whoſe ſhop their family had lodged their caſh, and therefore ordered what monies were to be paid to her, ſhould be paid in at Mr. *Norcort*'s ſhop: Mr. *Wych*, that there might be no delay, generally ſent up the money before quarter-day, and placed it in Mr. *Norcort*'s hands, where the Lady *Shaftſbury*, as ſoon as quarter-day was over, received it, both for herſelf and her ſon; and about *July* laſt, he lodged 350*l.* being one quarter of the lady's and her ſon's annuities, in the ſaid Mr. *Norcort*'s hands, in order to be ready at *Michaelmas* quarter, as appeared by his own affidavit: on *Michaelmas-day* Mr. *Norcort* ſtops payment, and is ſince become a bankrupt; and now, on the Lady *Shaftſbury*'s petition, the queſtion was, on whom the loſs ſhould fall.

A. is appointed receiver of an eſtate, out of which he is to pay *B.* an annuity quarterly. *A.* acquaints *B.* who his banker was, and that the money ſhould be depoſited in his hands for his uſe. *B.* names another, being a perſon he uſed to deal with, and orders him to pay it into his hands, which *A.* did ſeveral times; but the money payable on *Michaelmas*, being paid in *on July before, on Michaelmas-day the banker ſtopped payment, and became a bankrupt; it was held that the loſs ſhould fall wholly on the receiver, B. having no right to the money before that day.*

My Lord Chancellor was clear of opinion, that the Lady *Shaftſbury* ought not to bear the loſs of any part of it, for till *Michaelmas-day* was paſſed, ſhe had no right to demand or receive it; that therefore, in the mean time, Mr. *Norcort* was Mr. *Wych*'s caſhier, and he * might, notwithſtanding his having lodged the money there, have taken it out again before *Michaelmas-day* was paſt, even though it were on *Michaelmas-day* itſelf, provided he had it ready the next day to pay the lady; that conſequently *Norcort* could have no power to receive it for

the lady before, becauſe ſhe had no power herſelf, nor any right to demand it before quarter-day; that ſhe could not demand, or at leaſt receive it on *Michaelmas-day* itſelf, becauſe it is one of the days that no goldſmiths open ſhops, or make any payments whatſoever; and therefore the lodging the money at that ſhop before the lady became entitled to it, ought not to turn to her prejudice, but ſhe muſt have it made good to her by the receiver; but whether it ſhould fall on the receiver, Mr. *Wych*, himſelf, or to be borne out of the Lord *Shaftſbury*'s eſtate, my Lord ſaid, would come properly in queſtion when he made up his accounts with my Lord on his coming of age, and was not now in queſtion before the court; but ſaid, he was inclined to think the receiver was not to be anſwerable for the loſs, any more *than if he had been bringing it up in ſpecie, and had been robbed on the road.*

Vid. 2 Vezey, 240.

Another part of the petition was to have the ſum of 143*l.* extraordinary, for the expences my Lady had been at in a fit of ſickneſs of the young Earl, over and above his quarterly maintenance, and this was not at all oppoſed, but for form ſake was ſent to the Maſter to ſtate the matter, and to report whether that ſum had been actually expended on that occaſion or not.

*DE 560

Termino Paſchæ,

1721.

In Curia Cancellariæ.

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† Seagood *verſus* Meale and Leonard. Caſe 345.

Gilb. Chan. 238. 2 Eq. abr. 49, p. 20. 1 Strange, 426. 1 Atk. 12.—Vide 6 Comyns's Dig. (tit. Agreement) 136.

THE bill was brought for a ſpecific execution of an agreement for the purchaſe of nine houſes, which were in mortgage to the defendant *Leonard* for 150 *l.* The defendant *Meale*, the owner of the houſes, agreed to ſell them to the plaintiff for ſuch a ſum of money, and the plaintiff paid him a guinea in part, and ſent a note to this effect; Mr. *Leonard*, *pray deliver my writings to the bearer, I having agreed to diſpoſe of them; am your humble ſervant.* The defendant *Leonard* would not part with them, unleſs all his money were paid him down, and after bought the houſes of *Meale* himſelf; and thereupon the plaintiff brought this bill.

A. agrees with *B.* for the purchaſe of 9 houſes, which were in mortgage to *J. S.* and pays him a guinea in earneſt. *B.* writes a note to *J. S.* and deſires him to deliver up the writings, he having diſpoſed of them, which *J. S.* refuſed, unleſs all the mortgage money was paid him down, and afterwards purchaſes them himſelf. On a bill brought by *A.* for a ſpecific execution of the agreement, it was held, that neither the guinea paid down, nor the note, which was only an evidence of aſſent, but did not aſcertain the terms of the agreement, were ſufficient to take it out of the Statute of Frauds and Perjuries.

† Vide Stat. 23 *G.* 3. c. 58.

The

The defendant by his anſwer inſiſted upon the Statute of Frauds and Perjuries; and the queſtion was, Whether the letter or note would bring it out of the ſtatute? for as to the payment of the guinea, that was * agreed clearly of no conſequence, in caſe of an agreement touching lands or houſes, the payment of money being only binding in caſes of contracts for goods.

561

2 Eq. abr. 46. 12.

And it was decreed that would not, for it ought to be ſuch an agreement as ſpecified the terms thereof, which this did not, though it was ſigned by the party; for this mentioned not the ſum that was to be paid, nor the number of houſes that were to be diſpoſed of, whether all or ſome, or how many, nor to whom they were to be diſpoſed of, neither did this letter mention whether they were to be diſpoſed of by way of ſale or aſſignment of leaſe, and ſo all the danger of perjury, which the Statute was to provide againſt, would be let in to aſcertain this agreement.

Antè, 526. Eq. abr. 20, pl. 7. 21. 16. 2 Vent. 361. 1 Vern. 110. 5 Viner abr. 522, pl. 34.

Promiſing by letter to give ſo much as a portion, ſufficient to bring the agreement out of the Statute of Frauds.

This caſe differs from a caſe which was cited, of a letter wrote by one, promiſing to give ſuch a fortune with his daughter to one who ſhould marry her. A man who marries on the encouragement of this letter, ſhall recover, becauſe the agreement is executed on his part as far as it can be, and can never be undone after.

Lord *Ayleſford*'s caſe, 2 Strange, 783, *è cont.*

Though a leſſee for years, on a parol agreement, and the credit of a promiſe of having a leaſe made to him, continues in poſſeſſion; yet it is within the Statute of Frauds, and equity will not enforce, eſpecially if no improvements were made by him.

So where a man, on promiſe of a leaſe to be made to him, lays out money on improvements, he ſhall oblige the leſſor afterwards to execute the leaſe, becauſe it was executed on the part of the leſſee; beſides, that the leſſor ſhall not take advantage of his own fraud to run away with the improvements made by another; but if no ſuch expence had been on the leſſee's part, a bare promiſe of the leaſe, though accompanied with poſſeſſion, as where a leſſee by parol agreed to take a leaſe for a term for years certain, and continued in poſſeſſion on the credit thereof, yet there being no writing to make out this agreement, it is directly within the ſtatute, and ſo was held by the Maſter of the Rolls, in the caſe of *Smith* and *Turner*, *Mich.* laſt, at the Rolls; and in the principal caſe the bill was diſ-

1 Vern. 151. 159.

miſſed,

miſſed, but without coſts, for ſome fraud in the defendants to defeat the plaintiff of his bargain.

* Semphill & Ux' *verſus* Bayly & Ux'. Caſe 346.

2 Eq. abr. 213, c. 6. S. C. Antè, 140. 290. and marginal references. 1 Atk. 363. S. C. cited. 2 Atk. 184. S. P.—*è contrà*, Brown's Rep. 303.

Nathaniel Gaſkill had iſſue three daughters only; *viz.* *Sarah* his eldeſt, one of the plaintiffs; *Elizabeth* his ſecond, and *Rebecca* his third, both defendants; and there being an amour carried on between the plaintiffs in his life-time, he greatly diſliked thereof, and declared, if his daughter married the plaintiff, he would not give her a groat, upon which he diſcontinued his ſuit to her; after, the father, the 12th of *November*, 1716, makes his will, and thereby deviſes all his real and perſonal eſtate to his executors, to the uſes following;

In the Dutchy court, *coràm* *Lechmere* Chancellor, *King* Chief Juſtice, and Juſtice *Dormer*. *A.* having iſſue three daughters. *B. C.* and *D.* deviſes 1000 *l.* to *B.* to be paid her at the age of 21, or marriage, upon condition that ſhe married with the conſent of his executors, and likewiſe deviſes to her ſeveral meſſuages, *&c.*; and after ſeveral other legacies, he deviſes the reſidue of his eſtate to the executors, for the benefit of his children: though *B.* married a perſon, who made his addreſſes to her in her father's life-time, which the father knew, and was diſſatisfied at, and had notice by the executors of her father's will, yet there being no limitation over, this will not amount to a forfeiture, being only *in terrorem*.

That is to ſay, to his daughter *Sarah*, for her maintenance, 35*l. per ann.* and no more; and to his daughter *Elizabeth* 35*l. per ann.* for her maintenance, and no more; and then goes on, and if my daughter *Sarah* ſhould happen to marry with the conſent of my executors, then I deviſe to her the ſum of 1000*l.* in part of her portion, to be paid to her at the age of 21 years, or day of marriage, which ſhall firſt happen; and at the end of three years, after my death, all the meſſuages (and enumerates ſeveral meſſuages), *&c.* all which I will, and ſhall be to my ſaid daughter for life, without impeachment of waſte; remainder to her firſt and other ſons ſucceſſively, in tail general; remainder to her daughters in tail general, to take as tenants in common, and not as joint-tenants, paying to his wife 70*l. per ann.* during her life.

Item, I give to my daughter *Elizabeth* 1000*l.* in part of her portion, to be paid to her at her age of 21 years, or day of marriage, which ſhould firſt happen, and at the end of three

years

years after my death, all that meſſuage, &c. and ſo gives her
563 ſeveral other meſſuages * and lands, other parts of his eſtate, all which he gives her for life, without impeachment of waſte, with the like limitations as is made in the former ſiſter's caſe, and then orders them to take as tenants in common.

Item, I give to my daughter *Rebecca* 30*l. per ann.* for her maintenance, till ſhe attain the age of 15 years, and after 35*l. per ann.* *Item*, I give my daughter *Rebecca* 1000*l.* in part of her portion, to be paid to her at her age of 21 years, or day of marriage, which ſhall firſt happen; and if ſhe ſhall marry with the advice and conſent of my executors, then I give her all the meſſuages, &c. and ſo gives her other parts of his eſtate, all which he directs ſhall be ſettled on her in like manner, for her life, without impeachment of waſte, and ſo on directly as in the other ſiſters caſes.

And then goes on; In caſe any of my ſaid daughters ſhall happen to die without iſſue, then that child's part to go to the ſurvivor: and after ſome legacies given, deviſes all the reſidue of his real and perſonal eſtate to his executors, upon truſt, to manage and improve the ſame for the benefit of the daughters, and thereout to pay, in the firſt place, all taxes, legacies, chief rents, and other rents and ſervices; and the overplus, if there be any, as I doubt not but there will, I give and deviſe to my ſaid three daughters, to be equally divided betwixt them; and makes two of the defendants executors, and ſoon after dies.

After his death, the plaintiff *Semphill* renewed his addreſſes to the other plaintiff his wife, and the executors having notice of it, expreſſed their diſlike thereof, and ſent the plaintiff *Sarah* notice thereof in writing, and of her father's will, ſo that ſhe would be in danger of forfeiting her portion, if ſhe married without their conſent, and they could not give their conſent, becauſe they knew it was a match their father diſliked. Notwithſtanding the plaintiffs, who lived at *Mancheſter*, about five months ago intermarried; the plaintiff being an officer, but a
564 gentleman * of a good family and fortune, not at all inferior to the other plaintiff.

And

And now this bill was brought for the 1000*l.* and to have a diſcovery of the deeds and writings belonging to the eſtate deviſed to the plaintiff; and the cauſe was heard on bill and anſwer only, and the defendants, the other ſiſters, inſiſted, by their anſwer, on the benefit of the plaintiff's fortune, in caſe it were forfeited; and the executors ſet forth the whole matter, and ſubmitted to do as the court ſhould direct, being indemnified.

The Chancellor *Lechmere* [was aſſiſted] by the Lord Chief Juſtice *King*, and Mr. Juſtice *Dormer*; and the Chief Juſtice and Chancellor were of opinion, and the decree was accordingly, that in this caſe the fortune was not forfeited by this marriage without conſent; but Mr. Juſtice *Dormer* held it was.

The reaſons they gave were, that here there appeared no intention throughout the will to make it a forfeiture; that if in any caſes whatſoever ſuch clauſes may be conſtrued to be *in terrorem*, they muſt be ſo here, for it ſeems to be nothing but a looſe inconſiderate way of expreſſing himſelf, and is only a cautionary proviſion, that his daughters ſhould have the conſent of his executors in their marriage; but the will is not at all coherent throughout; that though there is that condition annexed to *Sarah*'s fortune, yet it is totally omitted as to *Elizabeth*, and in *Rebecca*'s it comes between the deviſe of the money, and the deviſe of the land.

Then, 2*dly*, Here is no deviſe of it over, though he had occaſion in two ſeveral places of his will to have taken it up again, and given it over, if that had been his intent; or where he deviſes, if any of his daughters die without iſſue, he would have inſerted, *or marry without ſuch conſent*, if that had been his intent, or at leaſt he would have taken notice of it at the cloſe of his will; but that he has not done neither.

* And then the laſt deviſe of the overplus will not carry it, for that is, of the overplus of the reſidue of his real and perſonal eſtate, after the legacies juſt before mentioned were paid; beſides, he adds, if there be any overplus, as he doubted not but there would, which ſhews, that he had no thought of the 1000*l.* 565

for

for that was a ſum, and might be deviſed over in caſe of a forfeiture, with as much ſecurity as it was given at firſt, and then he would not have ſaid, if there be any overplus.

2 Wms. 528. That theſe clauſes in reſtraint of marriage have never been taken favourably; that if there be no deviſe over, they have always been held to be only *in terrorem*; that otherwiſe ſtrangers, executors, might run away with a great part of a man's eſtate from his children.

That the diſtinction between a deviſe over, and where there has been no deviſe over, has been taken in all caſes, and was certainly a very good one; that though lawyers knew it would be no forfeiture, yet the parties themſelves might not be ſo learned, and therefore it would be ſome terror to them to venture to break it; but theſe ſort of reſtrictions could hold no longer than till the party came of age, after which they would be entitled to their fortunes, and might bring a bill for recovery of them.

Note; In this caſe were cited *Fry* cont. *Porter*, 1 *Vent.* 300. 1 *Chan. Caſes*, 122. Sir *Andrew Bellaſis*'s caſe, 346. *Floyd* and *Hughes*; Lord *Saliſbury*'s caſe.

*DE 566

Termino S. Trinitatis,

1721.

In Curia Cancellariæ.

Farrington *verſus* Knightley.

Caſe 347.

January 10.

1 Eq. abr. 421, c. 2. 424, c. 8, 9. 440, c. 39. S. C. Antè, 12. 81. 92. 169. † 1 Peer Wms. 544. S. C. 3 Atk. 228. Brown's Rep. 155. S. C. cited.

THIS was a cauſe wherein my Lord Chancellor had taken time to conſider and ſee precedents, and was this: One *Upton* of *Grays-Inn*, a batchelor, began his will in writing, with his own hand, and thereby gave ſeveral legacies, and gave the defendants, who were two of them his ſiſters, and one of them his niece, 50 *l.* apiece, and made them executors; but before he had finiſhed or ſigned his will, he died, poſſeſſed of a conſiderable perſonal eſtate: and this being proved as a teſtamentary ſchedule, the plaintiffs, as next of kin, brought this bill againſt the defendants, the executors, for a diſtribution of the ſurplus; and the only queſtion was, Whether the plaintiffs were entitled to ſuch diſtribution, or whether the defendants, the executors, ſhould go away with it? And it was decreed for the plaintiffs, on view and conſideration of all the precedents.

A. deviſes 50 *l.* apiece to his two ſiſters, and 50 *l.* to his niece, and makes them three executors, without diſpoſing of the reſidue of his perſonal eſtate; the ſurplus ſhall be divided amongſt the next of kin, and ſhall not go to the executors.

† This caſe is very fully reported by Peer Williams.

My Lord Chancellor was clear of opinion, that executors, in theſe caſes, were but truſtees; that if the teſtator intended them the ſurplus, could he not eaſily have ſaid ſo? that to give
567 them the ſaid thing * twice over would be abſurd, for the legacies muſt come out of the ſurplus.

That ſince the Statute of Diſtribution, the ſucceſſion to a perſonal eſtate was as much eſtabliſhed as the ſucceſſion to the real eſtate was before; that becauſe they are made executors, they therefore muſt have the ſurplus to their own uſe, would be to conſtrue the will by a rule, which probably the teſtator did not underſtand, for he might be ignorant of the import of the word executor, or never intend, by making them ſuch, to give them his perſonal eſtate; that here it would be the more unreaſonable, becauſe they had legacies given them.

1 Vernon, 473. That he had looked into the caſe of *Forſter and Munt*, and there was no fraud at all in that caſe in the executors, *though it had been greatly held there was.*

That if *A.* and *B.* ſeverally make their wills, and make *C.* executor, and *A.* gives him the ſurplus of his perſonal eſtate, but *B.* does not, and then *C.* dies inteſtate, in this caſe the perſonal eſtate of *A.* and *B.* ſhall go ſeveral ways, for the adminiſtrator of *C.* is admitted to the adminiſtration of the perſonal eſtate of *A.* but the next of kin to *B.* are to have adminiſtration to him, and will be entitled to his perſonal eſtate; which proves *C.* as to that, was but a truſtee.

† 1 Wms. 701, much more accurately ſtated, and according to the Regiſter's book. And a caſe was cited of *Bagwell and Dry*, where a man deviſed his real and perſonal eſtate to his four daughters, and their heirs, executors, and adminiſtrators; one of the daughters died, and the queſtion was, who ſhould have her ſhare;

† This caſe, as ſtated in 1 Wms. 701, is to this purport: *J. S. inter al'*, bequeathed the ſurplus of his perſonal eſtate unto four perſons, equally to be divided between them, ſhare and ſhare alike, appointing *A. B.* his executor in truſt. One of the four reſiduary legatees died in the life of the teſtator, after which the teſtator died, and the queſtion being to whom the fourth part, deviſed to the reſiduary legatee (who died in the life of the teſtator) ſhould belong; Lord *Macclesfield* held, that the deviſe of ſuch fourth part of the *reſiduum* became void, the reſiduary legatee dying in the life of the teſtator, and was as ſo much of the teſtator's eſtate undiſpoſed of by the will; that the *reſiduum* being deviſed in common, it could not paſs to the ſurviving legatees, and the executor being but a mere truſtee, it muſt belong to the next of kin, according to the Statute of Diſtribution, as in caſe of an *inteſtacy*. 1 Wms. 701.

and

and it was decreed to go, in the ſame manner as a real eſtate, to the ſurviving daughter.

And in this caſe was likewiſe cited the Earl of *Briſtol* cont' *Hungerford*, where Sir *William Baſſet* deviſed his perſonal eſtate to pay his debts and legacies, and gave 1000 *l.* apiece to his executors; and it was agreed, that the ſurplus ſhould go to the repreſentatives of the next of * kin: alſo † *Bayly cont' Powel, Randal and Rookey*, ‡ *Ward cont' Lant, Weſtmore cont' Jones*, ‖ *Batchelor and Searle*, § *Dutcheſs of Beaufort's Caſe, Edward and Eyles*, and *Paules cont' Smiths*; and my Lord Chancellor was of opinion, that none of theſe caſes are inconſiſtent with the general rule he laid down; ſo that the executors are but truſtees, and were to have nothing more to their own uſe than what the teſtator plainly intended them as legatees or deviſees, and not the whole *reſiduum*, by virtue of the executorſhip.

Antè, 81. 2 Vern. 645. S. C. cited, 2 Vern. 361. 3 Wms. 194, note.

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† Antè, 92.
‡ Antè, 181.
‖ 2 Vern. 736.
§ 2 Vern. 648. 1 Wms. 114. S. C. 1 Brown's Parl. Caſes, 305. S. C.

Sir Harry Peachy *verſus* Duke of Somerſet.

Caſe 348.

16 *June*.

2 Eq. abr. 227, pl. 9. S. C. 2 Wms. 147. S. C. cited. Poſt, 591. 2 Vern. 537. S. P.

THE plaintiff's father was a copyholder in fee, under the Duke of *Somerſet*, of ſome copyhold lands of about 14 or 15 *l. per ann.* and made a ſurrender thereof to the uſe of himſelf for life; with remainder to his firſt and other ſons, on his marriage, in tail male; with remainder to himſelf in fee; but it did not appear that there was ever any admittance on the ſurrender in the father's life-time: the father was likewiſe ſeiſed of freehold lands adjoining the ſaid copyhold lands, wherein were ſome quarries of ſtone.

In court Lord *Macclesfield*. A court of equity will not aſſiſt a copyholder againſt a forfeiture, which is found ſuch at law, unleſs in caſes where a compenſation can be made.

The father, in his life-time, made ſome leaſes for years of this copyhold land, not warranted by the cuſtom of the manor; and likewiſe carried on his work from the ſaid quarry of ſtone, out of his freehold lands, into the ſaid copyhold lands; but had no licence for making the ſaid leaſe, or for working the ſaid quarry in the copyhold lands.

After his death, in the great ſtorm which happened in the year 1703, ſeveral of the trees ſtanding in the copyhold lands were blown down, and the tops of all others broke off, ſo that now the plaintiff, who was juſt come of age, cut off, lopped the tops of ſeveral others of the trees, and ſome he quite cut
569 down, to * make the avenue to his houſe the more uniform and regular.

It was likewiſe proved in the cauſe, that he had made ſome incloſure in the copyhold lands, whereby the ſame, which before lay open and unincloſed, was ſeparated and divided from the other, and theſe things he had frequently done, notwithſtanding repeated admonitions from the defendant and his agents to the contrary.

It appeared in the cauſe, that the plaintiff, who was a perſon of conſideration, had encouraged others of the copyhold tenants to take the ſame liberty, and expreſſed great contempt for the lord of the manor, with reſpect to his authority over his copyholders.

Upon which the defendant brought his ejectment, and had a verdict at law, as for a forfeiture, and to be relieved againſt theſe forfeitures the plaintiff now brought this bill; and the only queſtion was, Whether theſe were ſuch ſort of forfeitures as a court of equity could or ought to interpoſe in by way of relief?

It was agreed, that for non-payment of rent or fines, or ſuch like things, where a value might be ſet on them, and a compenſation made to the lord of the manor for any laches in point of time, it could; it was likewiſe agreed, that any forfeiture committed by a copyholder for life would not bind the perſon in remainder; but in the principal caſe, as there was no admittance upon the father's ſurrender, it was the ſame thing as if no ſurrender at all had been made, and that the copyholder, who made ſuch ſurrender, continued, to all intents and purpoſes, both with reſpect to the lord, and with reſpect to ſtrangers, the ſame as if no ſuch ſurrender at all had been made; that he was to do ſuit and ſervice, and to pay his rent to the lord, and might maintain

maintain an action of treſpaſs againſt any ſtranger, notwithſtanding ſuch ſurrender, and as if none at all had been made.

* It was likewiſe agreed, that conditions in law, as thoſe in the principal caſe, were allowed to bind infants, as well as perſons of full age, and that no notice was requiſite to be given of them; though, if it were neceſſary, here is expreſs notice given the plaintiff to forbear ſeveral of thoſe acts. 570

And therefore, as to the principal point, it was urged, that if any acts whatſoever could be a voluntary forfeiture, theſe muſt be ſuch, and that a court of equity ought not to relieve againſt them.

That the ancient rule for the juriſdiction of this court was confined to thoſe ſort of caſes, that is to ſay, to frauds, accidents, and truſts; and this was by no means within the reaſon and meaning of any of them. Eq. abr. 130, pl. 4. 4 Inſt. 84.

That no compenſation could be made to the lord for what had been done in this caſe; that though it was true, in all caſes whatſoever, ſome ſort of compenſation could be made, yet not ſuch an one within the meaning of that rule wherein compenſation had been allowed; that therefore this differed exceedingly from the caſes of forfeiture for non-payment of rent, of fines, or other pecuniary duties; and if the court could interpoſe in this caſe, ſo they might, with as much reaſon, when a tenant for life, or years, of freehold lands, ſhould take upon him to levy a fine, or make a feoffment in fee; for in theſe caſes it may be ſaid, that in ſome caſes a compenſation might be made to the perſon in remainder or reverſion, but that was never attempted, nor could it be ſo much as pretended that the court would relieve againſt forfeitures of this ſort. Vid. Antè, 108. Poſt, 591. 2 Wms. 146. Poſt, 572. S. P. affirmed by the Chancellor.

That the reaſon of the forfeiture was in conſideration of the injury done to the lord, that is, in the preſent caſe, thoſe leaſes at common law being without licence, might in time be made uſe of as evidence to prove it a freehold; that the lopping and topping of the trees for ever ſpoiled the growth of them, and prevented their coming to be timber.

571 * That the carrying on the quarry to the copyhold lands was the ſame thing as if it had been firſt opened therein, which no copyholder could do.

That the incloſing the copyhold lands one from another, might in time deſtroy the evidence of their being copyhold, as it deſtroyed the ancient boundaries thereof, and ſo it would be to convert meadow or paſture ground into arable.

1 Ch. Rep. 170. *è contrà.* That no caſe could be put, where the court had relieved in caſes of this nature; that where a leaſe was made of church lands, under a proviſo not to aſſign without licence, this *court* would not relieve againſt the forfeiture, as it could not alter the terms on which the leſſor himſelf thought proper to part with his lands, or force a tenant upon him in ſpite of his teeth; indeed, if this were only by way of *covenant* on the part of the leſſee, it might poſſibly be otherwiſe.

That in the principal caſe they were in poſſeſſion of the law, and had recovered a verdict, and to take it away from them would be to alter the eſtabliſhed courſe of the law, and to make a new one, which they ſuppoſed a court of equity had no power to do; and the caſe of *Thomas* cont' *Porter*, 1 *Chan. Caſ.* 95, 96. was ſaid to be monſtrous, that the lord, who had upon two trials at law recovered verdicts, ſhould not only be obliged to account for the meſne profits, but alſo pay coſts.

That this was not an application to be relieved againſt the rigour of the law, or to relax the law, but directly to make a new law; and the plaintiff, by bringing this bill, had admitted the law to be directly againſt him, otherwiſe he might make uſe of it as his defence at law.

That it would be of the utmoſt conſequence to lords, if the plaintiff ſhould be relieved in this caſe; for then it would be but endeavouring to keep theſe things ſecret for a conſiderable
572 while, and in time they would * grow into an evidence of freehold; or, if the tenant ſhould be found out, it would be only bringing his bill here, and all would be ſafe.

My

My Lord Chancellor was clear of opinion, that there was no foundation for equity to interpoſe, that it would be to alter the nature of the tenure, and the terms whereby copyholds ſubſiſted; that if this was a forfeiture at law, a court of equity had nothing to do with it, and that it was like the caſe of a feoffment made, or fine levied, by a particular tenant, againſt which there could be no relief. 2 Wms. 146. Poſt, 591. Antè, 570. ſed vide Antè, 108.

That copyholders were but tenants at will, though it were according to the cuſtom of the manor; that this entirely differed from the caſe of a forfeiture for non-payment of rent, *or* non-payment of a fine; for there the eſtate was but in the nature of a ſecurity for thoſe ſums, and the lord might be recompenſed in damages and coſts.

That to make a leaſe for years without licence was a forfeiture, as it was a determination of his will; and though the lord ſhould refuſe to grant ſuch licence, yet the tenant has no remedy, nor would this court compel the tenant to grant ſuch licence.

That though theſe copyholds are mended by time, and are in the nature of an inheritance, yet ſtill the tenant is obliged to obſerve the law and cuſtom to which they are ſubject; that theſe cuſtoms are in the nature of a limitation of an eſtate, which determines upon the breach of them; that unleſs there were ſome equitable circumſtances in this caſe, this court cannot interpoſe, which would be to repeal and deſtroy the law.

Note; In this caſe Sir *Harry Peachy*, in 1693, on his marriage, ſurrendered theſe copyhold lands to the ſeveral uſes in his marriage ſettlement; which were to the uſe of himſelf for life; remainder to his firſt and other ſons ſucceſſively, in tail male; remainder to himſelf in fee; and he had iſſue a ſon, not yet of age, who was complainant with him in this ſuit; but there *had been no admittance at all upon this ſurrender, for want of 573
which it was clearly held, that Sir *Harry Peachy* continued, and was to be conſidered as abſolute tenant to the duke of the copyhold lands, for which was cited *Cro. Jac.* 403, and *Buſſt.*

and *Yelv.*; that conſequently Sir *Harry* was but truſtee for his ſon of the inheritance of thoſe lands, but the whole inheritance, *quoad* the lord, was in Sir *Harry*, and any act of forfeiture done by him would bind the inheritance, becauſe there muſt always be ſome tenants to anſwer for the whole; for if there had been an admittance of the father for life, and of the ſon in remainder, becauſe they come in as it were by two diſtinct grants from the lord himſelf, and therefore the acts of one will not bind or effect the other; but till there is an admittance on ſuch ſurrender, the lord is not bound to take any notice of it, but the tenant continues, to all intents and purpoſes, the ſame eſtate that he had before, and the rather, becauſe that he had no means to compel him to come in, and be admitted on ſuch ſurrender, and whether the ſon of Sir *Harry* will ever apply to be admitted on the ſurrender may be uncertain, and conſequently till he does Sir *Harry* is the only *tenant the lord can take notice of*, and his acts will bind and affect the whole inheritance; therefore, if he ſhould commit treaſon, it would be a forfeiture to the lord of the whole inheritance, and ſo it would be if any other truſtee of a copyhold, † *and the lord would not be bound by the truſt, nor would the lands in his hands be ſubject thereto*; for the *Ceſtuique Truſt* is not tenant, nor can any acts of his, either of treaſon, felony, or otherwiſe, charge or affect the copyhold lands. Indeed, if he ſhould bring his bill in this court againſt his father, and the duke, to compel an admittance purſuant to the ſaid ſurrender and ſettlement, it might come then to be conſidered how far this forfeiture of his father's would bind him; but at preſent nothing of this appears in the caſe, nor can the court take notice of it: but in regard of that * ſurrender, the bill as to him was diſmiſſed without prejudice, and as to Sir *Harry*, it was diſmiſſed abſolutely; but an injunction to ſtay his taking out execution on the judgment in ejectment was granted, becauſe it was inſiſted, that even at law ſeveral of thoſe acts were no forfeitures;

Hardreſs, 405. 488. 3 Chan. Rep. 403. 1 Sid. 33. Nelſon's Chan. Rep. 130. S. C.

574

† *Quære?*—Vid. Eq. abr. 384, the firſt marginal note. *Eales* v. *England*. Antè, 200. Hard. 465. 469. Eq. abr. 311.

and therefore a trial at bar was directed, on a new ejectment to be brought, to wait the event thereof.

In this caſe were cited a caſe of *Cox and Higford*, before Lord Chancellor *Harcourt*, where the court would not relieve againſt a forfeiture of a copyholder, even for permiſſive waſte for letting a copyhold houſe tumble down for want of repairs; but in that caſe the reaſon was, becauſe it was an abſolute refuſal to repair it for ſeveral years together, after repeated admonitions and preſentments of the jury of the waſte; and therefore it was equal to voluntary waſte. And the caſe of *Edmore and Craven*, where a Quaker refuſing to ſwear fealty, the lord ſeized as for a forfeiture; yet upon the circumſtances of the caſe, the court gave relief. Likewiſe were cited 1 *Rol. Abr.* 854. *Owen*, 641. *Leon.* 126. 2 *Vent.* 352. *Co. Lit.* 53. 63. and the caſe of *Naſh and the Counteſs of Derby*, before Lord Keeper *Wright*, where relief was againſt a forfeiture for cutting down timber by a copyholder; but the reaſon of that caſe was, becauſe the timber was employed about the repairs of the copyhold, and there was only a miſtake, whether the ſteward or woodman ſhould ſet out the timber.

2 Vern. 664. S. C.

Ibid. S. C. cited.

2 Vern. 537. S. C. Eq. abr. 121, pl. 19.

Note; The principal caſe held three days, and was ſolemnly debated; but as to the principal point, whether this court could relieve *againſt a voluntary forfeiture*, my Lord Chancellor was clear that it could not, and that it would be even to alter and repeal the very law of copyholds, which, though now ſupported by cuſtom, were at firſt eſtabliſhed by act of parliament, as all other parts of the common law were, till the records of them came to be loſt, though againſt a forfeiture for permiſſive waſte only relief may be given.

2 Wms. 146. Maxims in Eq. Max. 2, c. 3. S. P. Max. 12, c. 1. S. P. 1 Chan. Ca. 95, 96. S. P. Poſt, 591.— *è contrà*, Eq. abr. 121, pl. 20. *ebitèr*, and not the point decreed in that caſe.

575
Caſe 349.

* Sir Harry Hick *verſus* Phillips.

2 Eq. abr. 18, c. 10. 688. 6. S.C. Antè, 29. 538. 10 Mod. 503. 21 Viner abr. 543. S. P.

A. articles with *B.* for the purchaſe of an eſtate of 180*l. per ann.* for which he was to give 35 years purchaſe, upon granting and conveying to him, and pays 50*l.* in part; but diſcovering that 30*l. per ann.* of the lands were copyhold, refuſed to go on.

THE defendant in *June* laſt entered into articles with the plaintiff, for the purchaſe of an eſtate of 180*l. per ann.* for which he was to give 35 years purchaſe upon executing conveyances, and the plaintiff covenanted to grant and convey the lands to him upon payment of the purchaſe money; after the defendant diſcovering that about 30*l. per ann.* of theſe lands were copyhold, refuſed to go on with his bargain, and hereupon the plaintiff brought his bill for a ſpecific execution of the articles; and the rather, for that the defendant had paid 50*l.* in part upon executing the articles.

On a bill by *B.* equity will not decree a ſpecific execution of this agreement, being unequitable, but will order the 50*l.* to be paid back.

It was argued for the plaintiff, that there was no diſability on his part to perform the agreement; that the conveyance agreed to be made muſt be conſtrued *ſecundum ſubjectam materiam*, that is, the freehold by conveyance at common law, and the copyhold by ſurrender in the Lord's court, which was the proper conveyance for that ſort of land; and therefore the plaintiff being willing to perform his part, the defendant ought to be bound to compleat his part likewiſe.

But on the other hand it was argued and decreed by my Lord Chancellor, that the plaintiff ſhould have no aſſiſtance in a court of equity for carrying this agreement into execution; that they were not bound to aſſiſt contracts, which were harſh and unequitable, or were attended with ſuch circumſtances as would be a hardſhip on the defendant; that this was a caſe proper for a jury at law to conſider of, where they might mitigate or moderate the damages according to what the circumſtances ſhould appear to be, but this court could take no advantage of ſuch circumſtances, but muſt either decree an execution of the agree-

576 ment, or diſmiſs * the bill, and therefore the plaintiff ought to be

be left to make the moſt he could of it at law; that the plaintiff, in ſtrictneſs, could not perform his part of the agreement, for part of the lands, being copyhold, could not be conveyed within the meaning of theſe articles, the words thereof being all proper for conveyances at common law only, and this being copyhold, could not be ſo conveyed, unleſs it had been infranchiſed; and the caſe of *Young and Clerk* was cited, wherein the over value of the land was the reaſon the court would not decree an execution of the leaſes; and for the ſame reaſon ought not, for the over value of the money, in this caſe; † and therefore diſmiſſed the bill, and ordered the 50 *l.* to be paid back, but without coſts. Antè, 538.

Note; The defendant ſwore in his anſwer, he had no notice of any part of theſe lands being copyhold at the time of the articles; but there was no proof of any fraud or endeavours to conceal its being copyhold from the defendant, but only a general contract to convey all thoſe lands, without diſtinguiſhing whether freehold or copyhold.

† This part of his Lordſhip's decree appears to be inaccurate as above reported; and upon reference being had to the Regiſter's book, it appears, that the following order was made at the hearing of the above cauſe:

"*Monday*, 19th *January*, 1721.

"Upon debate and hearing of the articles and anſwer read, &c. his Lordſhip declared, that the plaintiff ſhould give an anſwer by the firſt day of the next term to the Regiſter, whether he would conſent to deliver up the ſaid articles, and repay the defendant the ſum of 50 *l.* he had received of him in part of his purchaſe money, on the defendants delivering back to the plaintiff his deeds and writings, and have his bill diſmiſſed without coſts; *and that if the plaintiff ſhould not ſignify ſuch conſent to the Regiſter by the firſt day of the next term, the bill ſhould ſtand diſmiſſed with coſts to be taxed: and the plaintiff not having ſignified his conſent to the Regiſter purſuant to the ſaid order, though the time for ſo doing is lapſed, the plaintiff's bill is hereby diſmiſſed out of this court with coſts to be taxed. Friday*, 27th *January*." Reg. Lib. A. 1720. f. 402.

*DE

Termino S. Mich.

1721.

In Curia Cancellariæ.

Case 350.

Bowaman *verſus* Reeve.

Antè, 207.

A native of *Holland*, poſſeſſed of a perſonal eſtate both there and in *England*, and making his will in *Holland*, how it muſt be conſtrued, ſo as to take effect, notwithſtanding the difference of the laws of each country.

THE defendant's teſtator being ſeiſed of a conſiderable eſtate in *Holland*, conſiſting in houſes, goods, merchandizes, jewels, and other effects, and being a native of that country, and reſiding there, ſends for a notary public to make his will, and, according to the cuſtom of the country, an inſtrument is drawn up in the nature of a will, and executed, whereby the teſtator gives ſome of the houſes to the miniſter of the Preſbyterian Meeting there, and others to the miniſter of the Reformed Church there; and then gives all the reſidue of his goods, chattels, plate, jewels, and other effects (which are very particularly enumerated) to the defendant, whom he makes his univerſal heir and executor, and dies poſſeſſed of a very conſiderable perſonal eſtate in *England*, beſides what he had in *Holland*.

By the laws of that country there is no diſtinction between real and perſonal eſtate, but both are equally liable to the ſatisfaction

tisfaction of creditors; and therefore, after the teſtator's death, his creditors in *Holland* took * poſſeſſion of thoſe houſes ſo 578
ſpecifically deviſed as aforeſaid, for the ſatisfaction of their debts; and though there were other conſiderable effects in *Holland*, yet the reſiding deviſee and executor would not intermeddle therewith, becauſe by the law of that country, if he does, he muſt take upon him the payment of all the teſtator's debts, whether they exceed or fall ſhort of his aſſets; but he proved the will here in *England*, and by virtue thereof poſſeſſed himſelf of all the teſtator's eſtate and effects here; and thereupon the plaintiffs, who were deviſees of the houſes in *Holland*, brought this bill againſt the executor and reſiduary legatee, to have a recompence in proportion to the value of the ſaid houſes.

And my Lord Chancellor decreed an account and ſatisfaction accordingly; and though it was urged, that thoſe houſes by the law of this country being liable to the payment of debts, and therefore the ſpecific deviſees muſt take them liable thereto, and that the teſtator never intended to give them otherwiſe, or to give them any other part of his eſtate, and that they muſt take them *cum onere*, yet he held that they ſhould have ſuch account and ſatisfaction as aforeſaid.

And my Lord Chancellor further ſaid, that there was no difference between a deviſe of theſe houſes, and a deviſe of a horſe, or a term for years here; and that in thoſe caſes, if the creditors bring an action, or take out execution upon a judgment againſt the executors, and take the horſe, or term for years, in execution, which they may do notwithſtanding the ſpecific deviſe thereof, yet moſt certainly the executor, or reſiduary legatee, ſhall be obliged in equity to make them a recompence; for they are to have nothing to their own uſe but the reſidue, after the debts and legacies paid, and this *reſiduum* is chargeable with the debts; though, as to the creditors, they muſt take what part they think fit in ſatisfaction of their debts, and the enumerating of particulars in this deviſe of the *reſiduum*, makes * it no 579
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more a ſpecific deviſe, than if he had only ſaid, in general, all the reſt of his goods and chattels, or ſuch like words; and therefore this *reſiduum is* liable to the payment of debts, although the creditors thought fit to fix on other parts of his eſtate, and thereby deprived the ſpecific legatees of what was intended them.

* D E 580

Termino S. Hillarii,

1721.

In Curia Cancellariæ.

Downam & al' *verſus* Matthews & al'. Caſe 351.

2 Eq. abr. 9, pl. 8. S. C. 1 Wms. 325. 2 Wms. 128. 1 Atk. 228. S. P. 236. S. C. cited. 8 Vin. abr. 560, pl. 26. Blackſt. Rep. 653.

THE plaintiffs were clothiers, and had mutual dealings with one *Biſs*, to whom they ſold and delivered ſeveral cloths, and *Biſs* ſet off the money owing to them in dying of cloths. Theſe dealings had been carried on for ſeveral years, without payment of money on either ſide; but the debts on one ſide were paid off againſt the debts on the other ſide: *Biſs* was likewiſe indebted to the defendants for cloths, and other goods, which he had bought of them; and on ſtating accounts between *Biſs* and the defendants, he appeared to be indebted to them in the ſum of 300*l.* and upwards, for which he made them a mortgage; and becoming after indebted to them in 200*l.* and upwards, he did, for ſecuring of that money, enter into a bond, and confeſſed a judgment to them. *Biſs* died inteſtate, and indebted likewiſe to ſeveral other perſons by bonds and other ſpecialties. The defendants took out adminiſtration as principal creditors,

A. a clothier, and *B.* a dyer, had mutual dealings in the way of their trade, which were carried on ſeveral years, without payment of money on either ſide. *B.* dies inteſtate, and indebted to others by ſpecialties, who as principal creditors take out adminiſtration to him, and ſue *A.* at law. Equity will enjoin the action, and order an account; and that *A.* ſhall be allowed by way of diſcount what was due to him from *B.*

creditors, and finding ſeveral ſums as due and owing from the plaintiffs, demanded payment thereof: the plaintiffs, on the
581 other hand, had ſeveral * ſums of money due and owing them from the inteſtate, and offered to account with the defendants, and pay what ſhould be due on the balance thereof; but inſiſted to retain what was owing them towards payment of what was owing from them to the inteſtate, as they had always done in his life-time. Upon this the defendants, being both adminiſtrators and creditors by ſpecialty as aforeſaid, thought themſelves entitled to a preference in payment before the plaintiffs, who were at moſt but creditors by ſimple contract; and thereupon the defendants refuſed to diſcount what was due to the plaintiffs from the inteſtate, out of what was due from the plaintiffs to the inteſtate, but inſtead thereof brought actions at law againſt the plaintiffs for the money owing by them to the inteſtate; and to be relieved againſt theſe actions, and that they may be allowed to ſtop their own debts out of what was owing by them to the inteſtate, the plaintiffs brought this bill; and the only queſtion was, Whether the defendants ſhould be obliged to enter into the account?

It was argued by the defendants that they ought not; that they were not only adminiſtrators, but alſo creditors, and creditors too by ſpecialty, and therefore had a right to recover and retain towards payment of their own debts, preferable to the plaintiffs, who were only creditors by ſimple contract; that this was a legal advantage they were entitled unto, and that a court of equity ought not to take it from them; however hard this might ſeem as againſt the plaintiff, yet the bare hardſhip of it could be no ground for relief in a court of equity; that † *before the late ſtatute it was* the ſame in the caſe of b nkrupts, that the debtors to the bankrupt ſhould be obliged to pay whatſoever they were indebted to him, without the liberty of retaining what he was indebted to them; and though this is now altered, yet the preſent caſe remains as at law, and the defendants ought not to be deprived of it by a court of equity; and
582 that to do this would be to invert and alter the * courſe of ad-

A court of equity will not deprive one creditor of a legal advantage in favour of another.

† 7 *G.* 1. cap. 31, and 5. *G.* 2. cap. 30, reſpecting mutual credit in caſes of bankruptcy.

miniſtration,

miniſtration, which allows that debts of a ſuperior nature ſhould be paid preferable to debts of an inferior nature, as the plaintiffs are.

But Lord Chancellor ſaid, that though generally ſtoppage was no payment, and that there were ſome caſes where this could not be done, as a man could not ſtop his rent for money owing to him, or a bond toward ſatisfaction of a ſimple contract debt; yet in caſes of this nature, where it appeared that the mutual dealing between the inteſtate and the plaintiffs were carried on for ſeveral years in this manner, without payment of any money on either ſide, it was a ſtrong preſumptive argument of an agreement to this purpoſe, and that without ſuch liberty of retaining againſt each other, they would not have continued on their dealings; but if it had been inſiſted upon by either party, that the other ſhould not be allowed to ſet off his debt out of what was owing by him to the other, as they could, that this would have ſoon broke off all dealings between them; that this was the conſtant uſe among merchants and traders, and the only reaſon which induced them to take ſuch goods as they wanted of one, rather than another, was, that ſuch other perſon in his way ſhould take of them the goods he wanted, and to ſet off one againſt the other; that the Statute of Bankrupts, which directed accounts to be taken in ſuch manner, did it becauſe it was reaſonable to have been ſo before, or elſe you muſt ſuppoſe that the parliament made an unreaſonable law; that if there was but the leaſt handle for directing ſuch an account, it ought to be done, as if, even in caſe of a bond, the intereſt had not been paid, but caſt up and allowed in goods, that this would entitle them to retain the whole againſt each, as the account ſhould come out, that the repreſentatives of each party would be in no better condition than the parties themſelves would have been, in caſe they had been living, and no pretence could have been to let the one go on for the recovery of his debt, without allowing * the other to retain his own debt thereout; and therefore ſent it to a Maſter to take the account accordingly, and ordered the plaintiffs coſts out of the aſſets.

Where ſtoppage will be allowed as good payment.
1 Vern. 122.
2 Vern. 428.
2 Wms. 130.

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Termino Paſchæ,

1722.

In Curia Cancellariæ.

Caſe 352.

April 14.

Ivy *verſus* Gilbert.

2 Eq. abr. 644, c. 16. 2 Wms. 13. S. C. Antè, 503. 2 Vern. 26. 1 Wms. 418. 2 Wms. 180, 669, acc. 3 Wms. 1. 1 Atk. 550, *è contra*.

Lord *Macclesfield*.

On a marriage ſettlement, on failure of iſſue male, a term for years is created, and veſted in truſtees, for raiſing a ſum of money for daughters, though there is no particular time appointed for raiſing it; and the words of the power are, that the truſtees ſhall raiſe it out of *the rents*, iſſues, and profits of the lands, as well by leaſing or demiſing of the ſame for 21 years, or three lives; yet may the truſtees, if there be occaſion, *by way of anticipation, mortgage the lands, or raiſe the money any other way.*

ONE *Roger Pomfrey* being ſeiſed of the eſtate in queſtion, which was about 160*l. per ann.* in the Weſt of *England*, in 1651 makes a ſettlement thereof, on his marriage, to two truſtees, and their heirs, to the uſe of himſelf for life; remainder to truſtees during his life, to ſupport contingent remainders; remainder to his wife for life, for her jointure; remainder to the firſt and other ſons of that marriage, in tail male; remainder to two other truſtees, for the term of 120 years; remainder to his own right heirs.

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* The term of 120 years was declared to be upon truſt, that if there ſhould be no iſſue male of that marriage, and one or more daughters, then that the truſtees, by and out of the rents, iſſues, and profits of the ſaid premiſſes, as well by leaſing, or by demiſing

demiſing the ſame for 21 years, or three lives, or for any term or number of years determinable on three lives, not exceeding 120 years, to raiſe and pay for the portions of ſuch daughters, if more than one, the ſum of 1500 *l.* equally between them; and if only one ſuch daughter, then the ſaid ſum of 1500 *l.* to ſuch only daughter, without limiting any time for the payment thereof, and without any proviſo for determining the ſaid term on payment of the money.

The marriage took effect, and the wife died ſome time after without iſſue male, leaving only one daughter. *Roger Pomfrey* lived until 1718; but in 1706 he made a voluntary ſettlement of the eſtate in queſtion, to the uſe of himſelf for life; remainder to *Hugh Pomfrey*, his nephew, for life; remainder to truſtees, during the life of his nephew, to preſerve contingent remainders, with remainder to the firſt and other ſons of the ſaid nephew, in tail male ſucceſſively; remainder to the defendant *John Gilbert*, for life, with remainder to truſtees, during his life, to ſupport contingent remainders, with remainder to his firſt and other ſons in tail male, with ſeveral remainders over.

Soon after the death of *Roger Pomfrey*, *Joan*, his only daughter (the truſtees for the term of 120 years being both dead) took out letters of adminiſtration to the ſurviving truſtee, and then married, and her huſband having occaſion for her portion, they applied to *Hugh Pomfrey*, who had been in poſſeſſion of the eſtate about three years, to have the ſame paid; but he, not being able to pay the ſame, joined with her and her huſband in a mortgage of the remainder of the term of 120 years to the now plaintiff, in conſideration of 1500 *l.* by him lent and advanced to the huſband, * with a covenant from *Hugh Pomfrey* for payment of the money. 585

It appeared in the cauſe, that *Hugh Pomfrey* had paid the intereſt of the 1500 *l.* from the death of *Roger*, firſt to *Joan* herſelf, and afterwards to the plaintiff, from the time of the mortgage, which was in 1712, to his death, having received the

whole profits of the eſtate during his life, and having made him and one of the defendants his executors; and on the death of *Hugh Pomfrey*, without iſſue, the defendant *Gilbert*, as next in remainder for life, entered on the eſtate in queſtion; and the repreſentatives of *Hugh*, not having aſſets to pay the 1500 *l.* the plaintiff now brought this bill againſt the repreſentatives of *Hugh* for a diſcovery of aſſets, and againſt the defendant *Gilbert*, that he might redeem or be foreclоſed.

For the plaintiff it was inſiſted, that he was an honeſt creditor, and having lent his money, his application to this court was proper; that though the clauſe which impowers the truſtees to raiſe the portions ſeems imperfect, yet it appears that the truſtees might mortgage the premiſſes, and that plainly there are ſome words wanting, for after a direction to raiſe the 1500 *l.* out of the rents, iſſues, and profits, it follows, as well by *demiſing*, *leaſing*, &c. and there is nothing after it to anſwer, as *by ſome other way*, or at leaſt this ought to be ſuppoſed in this manner, viz. *out of the rents, iſſues, and profits as well (as) by demiſing, leaſing*, &c. and that ſome other parts of the deed ſeemed to explain it in this ſenſe; and that the truſtees, or the repreſentative of the ſurvivor of them (which was *Joan* herſelf) had good power to mortgage the term for raiſing the money, as it had been frequently ſettled in this court, that where a ſum of money was to be raiſed out of the rents, iſſues, and profits of an eſtate, that if the ordinary annual profits would not do it, that they might mortgage or ſell the term itſelf; and
586 this * plainly appears to have been intended for a portion for *Joan*, and, if ſhe had married ſooner, might have been greatly inconvenient to her, if ſhe muſt have ſtaid till it could have been raiſed out of the annual profits.

Lord Chancellor. That the natural and primary interpretation of theſe words, *out of the rents, iſſues, and profits*, was out of the rents, iſſues, and profits, as they aroſe, and not by way of anticipation; but becauſe this might be ſometimes greatly inconvenient where proviſions were limited to be paid at ſuch a time,

therefore the court had extended the meaning of the words in ſome caſes, and to anſwer ſome particular purpoſes, that they ſhould likewiſe comprehend the profits of the term, by way of anticipation, as the land, and the profits of the land, were the ſame thing; and this, he thought, which at firſt was introduced to ſerve a particular purpoſe on ſome particular circumſtances, came by degrees to be extended to a kind of a general rule; but this, he ſaid, was only where a particular time was appointed for the raiſing and paying off the money, and it appeared plainly, that the ordinary annual profits of the land would not be ſufficient to raiſe it within the time; there they had been allowed to raiſe it, by way of anticipation of the profits, by way of mortgage, but in this caſe there was no particular time appointed for the raiſing of this 1500*l.* and therefore no occaſion to anticipate the profits of this term for that purpoſe.

He further obſerved, that here was no power to raiſe the 1500*l.* by way of anticipation of the profits, for more than 21 years, or three lives, or any number of years determinable upon three lives, and not for the whole 120 years; for the limitation of demiſing *or* leaſing for thoſe terms would be idle, and to no purpoſe, if they were at liberty on the firſt words, out of the rents, iſſues, and profits, to have mortgaged or * ſold the whole 587
term, becauſe that included and comprehended all other inferior ways of raiſing it by demiſe or leaſe, by any leſſer term.

Then as to the objection, that this was like the caſe of a mortgagee, who ſuffers the mortgagor to continue in poſſeſſion, and receipt of the rents and profits, that this does not prejudice his title, but that he may at any time after, whenever he thinks fit, bring his bill to foreclоſe, and the rents received by the mortgagor in the mean time ſhall not go in part of ſatisfaction, even though there were other incumbrances behind it.

And therefore my Lord was of opinion, and decreed in this caſe, that the money being to be raiſed out of the annual profits as they aroſe, that the receipt of *Hugh Pomfrey*, the tenant for life, was the receipt of *Joan* herſelf, as to thoſe in remain-

der; and the plaintiff ſtanding in the place of *Joan*, who by taking out adminiſtration to the ſurviving truſtee had the legal eſtate of this term, and was alſo *Ceſtuique Truſt* of it; and the plaintiff, by taking an aſſignment of the term, ſtands in her place as to the remainder-man, and conſequently the profits, which were received during his life, ſhall go towards ſatisfaction of the 1500 *l.* and what ſhall appear to have been unraiſed during his life to be charged on the remainder; though as againſt the repreſentatives of *Hugh*, by reaſon of this covenant for payment of the money, the plaintiffs muſt have an account, and his aſſets, as far as they will extend, to be applied towards ſatisfaction; and as to the profits received by *Hugh*, before his joining in this mortgage, his aſſets, by reaſon of this covenant, which makes it a debt by ſpecialty, to be liable to make the defendant ſatisfaction likewiſe, as to thoſe profits; otherwiſe my Lord was of opinion, that they ſhould have been applicable to recompenſe the defendant with what his eſtate was chargeable with, more by reaſon of *Hugh*'s * applying thoſe profits to his own uſe, as a debt by ſimple contract; but the covenant with the plaintiff makes it a debt by ſpecialty, which muſt take place, and decreed accordingly: though he agreed, that where a ſum of money was to be raiſed out of the rents and profits, and paid at a certain time, that they may be raiſed by way of mortgage on thoſe words, which was ſtill but out of the profits, though by way of anticipation of them; and that where lands were charged with debts or legacies, and then deviſed to one for life, with remainder over, that each eſtate ſhould only bear its own burthen, and not the whole profits be applied as they aroſe, which would defeat the particular eſtate; and till ſuch mortgage or ſale, it was ſufficient for the tenant for life to keep down the intereſt, but not in the principal caſe, where, from the nature of it, the 1500 *l.* was to be raiſed out of the profits, as they are, and the tenant for life ſhould not be at liberty to throw the whole burthen upon thoſe in remainder; but decreed likewiſe, that what might have been by letting of leaſes, ac-

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cording to the power, by way of fine, if *Hugh* had apprehended his eſtate chargeable with this money, and ſo had taken the benefit of making ſuch leaſes, that they ſhould be accounted for by the remainder-man, the defendant †.

Beech *verſus* Crull.

Caſe 353.
April 29.

Lord Chancellor on Demurrers. 2 Vezey, 247. S. P. Caſe of a plaintiff claiming under a will, where it is apparent, upon the conſtruction of it, that he has no title; demurrer allowed.

THE plaintiff bought 500*l.* third ſubſcription of the defendant, at 205 *per cent.* premium, for which he paid in ready money 1525*l.* and the defendant at the ſame time gave the plaintiff a bond to deliver him 400*l.* in the ſaid third ſubſcription, when the receipts ſhould be delivered out of the ſame by the company; and no receipts being delivered out, this bill was brought to have the money refunded, the plaintiff by his bill offering to deliver up the bond: the * defendant demurred to the plaintiff's bill for want of equity, and, by way of anſwer, offered to transfer to him the ſtock given by the company for the 500*l.* paid in upon the ſubſcription, and the demurrer was allowed.

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My Lord Chancellor ſaid, the plaintiff's equity was, that he was now to pay but 209 *per cent.* for this ſubſcription, and complains that he had not the receipt delivered out, which would have obliged him to pay 1000*l.* *per cent.* and ſaid, there was no colour in the world to demand back his money, but he muſt take back the ſtock given by the Company in lieu of it, as he agreed to ſtand in the ſeller's place, and would have been glad to do ſo, if it had proved an advantageous bargain; ſo muſt he too now, that it comes out to be otherwiſe; but ſaid, that the plaintiff might proceed at law if he thought fit, upon his bond, and make the beſt of it there.

† This decree was appealed from to the Houſe of Lords, and affirmed. 2 Brown's Parl. Caſes, 468.

Caſe 354.

* Dawes *verſus* Ferrars.

2 Eq. Caſes abr. 331, pl. 6. 2 Wms. 1. S. C.

Eodem Die.

One deviſes to his wife for life; remainder to his grand-daughter, who was heir at law, for life; remainder to his own heirs male: *a nephew*, although he be next heir male, cannot take by virtue of this laſt limitation, not having both parts of the deſcription verified in him.

Anté, 442. 461. 2 Vern. 729.

A Man by his will deviſes his eſtate to his wife for life; remainder to the defendant, who was his grand-daughter and heir at law, for life; remainder to his own heirs males; and the plaintiff, as heir male, brought this bill againſt the defendant, for an injunction to ſtay waſte: the defendant demurred, for that the plaintiff had no title, being only male, but not heir, the defendant herſelf being the teſtator's heir, and therefore the plaintiff could not take by purchaſe, according to *Co. Lit.* 19. and ſeveral other books; and this differs from *Brown and Barkham*'s caſe in this court, for there the limitation was to the heirs male of the grandfather, ſo was, *quaſi*, an eſtate tail in the grandfather, but here it is of a fee ſimple, which none can take, who has not both parts of the deſcription in him.

590 * Lord Chancellor ſaid, this had been ſettled in all the courts of *Weſtminſter-Hall*, and therefore it was dangerous now to ſhake it, though he thought *Shelly*'s caſe not agreeable to reaſon; and *Anderſon*, who reports the ſame caſe, ſays, the judges gave no reaſon at all for their opinions, though Lord *Coke* had made ſo long a report of their arguments; but however weak it was at firſt, the law has been taken accordingly ever ſince, and it is dangerous to remove ancient land-marks; and ſaid, it was no matter what the law was, ſo it be known; and ſaid, why do not you bring your action of waſte, and aſcertain the will at law? So the demurrer was allowed.

*DE

Termino S. Trinitatis,

1722.

In Curia Cancellariæ.

Lady Whetſtone and Sainſbury.

Caſe 355.

July 10.

2 Wms. 146. S. C. and S. P. and the ſequel of it upon a rehearing. Antè, 568. 572. S. P.—Antè, 108, *è contrà*.

At Lord Chancellor's on Pleas and Demurrers.

Huſband and wife, by marriage ſettlement, are made tenants for life; remainder to their firſt and other ſons of the marriage ſucceſſively, in tail male: after the birth of their eldeſt ſon, and 7 other children, they, by leaſe and releaſe, and fine, mortgage the lands; this is a forfeiture, and the mortgagee muſt loſe his money.

ON the marriage of the defendant's father, the eſtate in queſtion was ſettled on the father for life; remainder to the firſt and other ſons of the marriage ſucceſſively, in tail male; with other remainders over. The defendant was the eldeſt ſon of that marriage, and there were ſeven or eight other children; after the birth of all thoſe children, the father and mother having occaſion for about 300*l.* make a mortgage of this eſtate, which was done by way of leaſe and releaſe, and fine, *come ceo*, &c.; this mortgage money, by the addition of other monies lent, and intereſt from time to time, increaſed, till at laſt it came to 700*l.* and then it was aſſigned to the plaintiff, and another leaſe and releaſe, and fine, were levied and executed by the huſband and wife, for the making good of this aſſignment: the huſband died, and this bill was brought againſt the widow and eldeſt ſon, that they might redeem, or be foreclоſed, the mortgage money being near the value

of the eſtate, and to be relieved againſt the forfeiture. The defendant, the ſon, * pleaded the marriage-ſettlement of his father and mother, whereby they were but tenants for life, and inſiſted on the forfeiture.

1 Vern. 392

My Lord Chancellor allowed the plea, and ſaid, this was a contrivance to deſtroy the ſettlement, and diſinherit the ſon; and ſaid, he had declared his opinion before, in caſes of this nature, that there could be no relief, particularly in the caſe of Sir *Harry Peachy* and Duke of *Somerſet*; ſo the plaintiff loſt her whole money.

Ante, 572.

Caſe 356.

Chancey *verſus* May.

* Eq. abr. 166. 7. Gilb. 230. 2 Vezey, 312. 313. 3 Atk. 572. Brown's Rep. 101. S P.

Part of the proprietors of an undertaking may bring ſome others of them to an account, without making all the members parties, eſpecially if they ſue on behalf of themſelves and all the reſt.

THIS was a bill brought by the preſent treaſurer and manager of the *Temple Mills* braſs-works, in behalf of themſelves, and all other proprietors and partners in the firſt undertaking, except the defendants, who were the late treaſurers and managers, being about 13 in number, and was to call them to an account for ſeveral miſapplications, miſmanagements, and embezzlements of the copartnerſhip in the late *South-Sea* times, to the value of 50,000*l.* and upwards; the copartnerſhip conſiſted originally but of 18 ſhares, but thoſe 18 ſhares, in the year 1720, were ſplit and divided into 800.

The defendants demurred, for that all the reſt of the proprietors were not made parties, and ſo every one had the ſame right to call them to an account, and then they might be haraſſed and perplexed with multiplicity of ſuits; but the demurrer was diſallowed,

1*ſt*, Becauſe it was in behalf of themſelves, and all others the proprietors of the ſame undertaking, except the defendants, and ſo all the reſt were in effect parties.

† 2*dly*, Becauſe it would be impracticable to make them all parties by name, and there would be continual abatements by

† Vid. 2 Atk. 144. and Bunbury, 221.

death

death and otherwiſe, and no coming at juſtice, if all were to be made parties.

* Mentney *verſus* Petty.

Caſe 357.

June 28.

1 Vern. 335. 2 Vezey, 215. S. C. cited. 1 Wms. 25. 41. 595. 1 Vezey, 333. 2 Atk. 118. Coke's Inſt. Harg. ed. 23 b. 24 a. 1 Dornat, 661.

At the Rolls.

The difference between the civil and canon law, in the computation of the degrees of proximity; the former to be the rule in the conſtruction of the Statute of Diſtributions.

THIS was a caſe wherein the Maſter of the Rolls had taken time to conſider, and give judgment, in relation to the diſtribution of an inteſtate's eſtate; and he ſaid, the rule to be obſerved in theſe caſes was to be taken from the civil law, and not from the canon law, between which there was a wide difference in the computation of the degrees of proximity; for *the canon law*, prohibiting marriage between relations till after the fourth degree, that they might exclude as many as poſſible from the liberty of marriage within thoſe degrees, without a diſpenſation, reckon all in the direct aſcending or deſcending line, and thoſe in the collateral line correſponding with them to be but one degree; as for inſtance, father or mother, uncle or aunt, make but one degree; ſo grandfather or grandmother, great uncle or great aunt, make but two degrees; but *by the civil law*, the father or mother make one degree, the grandfather or grandmother two degrees, and the uncle and aunt three degrees; ſo that the grandfather or grandmother, in the diſtribution of an inteſtate's eſtate, ſhall be preferred before the uncle or aunt, as being nearer of kin, within the rules of computation, or the law of proximity, by the civil law; and ſo it was decreed by my Lord Chancellor *Cowper*, in the caſe of *Duppa*, for the grandmother, againſt the uncle or aunt; but if you go one degree further, and reckon to the great grandfather or grandmother, they are in equal degree with the uncle or aunt, as they are in the third degree in direct lines with the uncle or aunt, who are in the third degree in the collateral line; for you muſt reckon through the grandfather or grandmother to come to the uncle or aunt, and then they are in juſt the ſame degree

Blackſtone's Com. 8vo. vol. ii. 206. Blackſt. Law Tracts, 8vo. vol. i. p. 14. 173.

594 gree of remove from the nephew or niece in * the collateral line, as the great grandfather or great grandmother are in the direct aſcending line, and conſequently being in equal degree of kindred, by the rules of computation of the civil law, are equally entitled to the diſtributive ſhares with the uncle or aunt.

And he ſaid, that the Statute of Diſtributions was penned by a civilian, and, except in ſome few particular inſtances mentioned in the ſtatute, is to be governed and conſtrued by the rules of the civil law; and his Honour cited the caſe of *Carter* and *Crawley*, at the end of *Raym. Rep.* and ſeveral books of the civil law, where this manner of computing the degrees is expreſsly taken notice of and explained.

Vid. Blackſt. Com. vol. ii. 515 to 520.

Caſe 358. Kemps *verſus* Kelſey.

July 18.

Antè, 325.

A man, who marries a freeman of *London*'s daughter without his conſent, joins with his wife in a releaſe to the father, in conſideration of 100*l.* of all their right to his perſonal eſtate; after his death, this ſhall bar them of their cuſtomary ſhare.

THE defendant's teſtator was a freeman of *London*, and had ſeveral children; the plaintiff married one of his daughters without his conſent; but ſome time after the marriage, the father agreed to give the plaintiff 100*l.* provided he would releaſe whatever cuſtomary ſhare he might be entitled to of the father's perſonal eſtate after his death; and it was proved in the cauſe, the father ſaid he would not leave the plaintiff the leſs for it, and that it was what he himſelf had done upon his own marriage; accordingly the defendant and his wife acknowledged the receipt of this 100*l.* and the huſband's covenant, that he does and will accept it in full of whatever cuſtomary ſhare he may be entitled to, in right of his wife, out of the father's perſonal eſtate.

The father after made his will, and having only two daughters, the plaintiff, and one other married to the defendant, he deviſes 400*l.* to the defendants, to be put out at intereſt for the benefit of the plaintiff's wife for life, and after her death gives
595 this 400*l.* * to the defendant: it was computed that the plaintiff's

tiff's orphanage ſhare would have amounted to 400*l.* or thereabouts.

And this bill was now brought to have an account of the teſtator's perſonal eſtate, and to be let into their ſhare of the orphanage part, notwithſtanding the ſaid releaſe and covenant.—For the plaintiffs it was inſiſted, that there was a great deal of difference between this caſe, and a woman's contracting before her marriage with a freeman as to her cuſtomary ſhare; that ſhe was at liberty whether ſhe would marry or not, and therefore, whatever contract ſhe made before marriage to exclude herſelf of any part of his perſonal eſtate ought to be binding, and was always looked upon as a compounding for her cuſtomary ſhare; but a child was a child, whether ſhe would or not; that it was not a matter of her own choice; and therefore an act of this kind was to be looked upon as proceeding from the awe and influence of a parent, and ought to be no farther binding than it was juſt; and if it were otherwiſe, ſhe might for 100*l.* or a leſſer ſum, be excluded from five or ten times as much, or perhaps a great deal more.

That this was in the nature of a releaſe of a poſſibility of what the father would die worth, which could not then be known, or he might lay out his whole perſonal eſtate in land, and then there would be nothing for the cuſtom to operate upon; and therefore this releaſe of a poſſibility, in the caſe of a child to its parent, ought not to be concluſive, eſpecially as ſhe was under coverture, and the huſband, in regard to his wife, was under the ſame awe and influence. *See 1 Atk. 399.*

But notwithſtanding theſe reaſons, my Lord Chancellor was clear of opinion, that the plaintiffs had no pretence in the world for this bill; that this releaſe being executed only by the huſband and wife, there * was nothing under the father's hand, 596
whereby the certainty of this proviſion for them appeared in writing, and then by the cuſtom they were expreſsly barred to make any demand of more.

That

That if the plaintiffs, who are the very perſons who gave this releaſe, ſhould be let in to *ſet* it aſide, it would be a direct fraud on the father, for he was not obliged to give them a groat; and when he becomes ſo far reconciled as to give them this 100*l.* upon conſenting to give this releaſe, and the huſband covenants to accept it in full of his wife's cuſtomary ſhare, that if they ſhould now be admitted to ſet all this aſide, it would be a direct fraud on the father, who, if it had not been for this releaſe, might have laid out his perſonal eſtate in the purchaſe of land, and thereby have prevented entirely the plaintiffs from the leaſt pretence of any further ſhare; and that, perhaps, the reaſon of his not doing of it, might be in confidence of the plaintiffs being barred from demanding any more.

That this *tittle-tattle* of his not leaving them leſs, was of no conſequence, when he was not obliged to have given them any thing.

And he ſaid, this cuſtom of the city of *London* was the remains of the old common law, that a man could not give away any part of his eſtate without the conſent of his children, and is ſo taken notice of in *Bracton*; but it being found extremely inconvenient and hard, it was by the tacit conſent of the whole nation abrogated and grown into diſuſe, for what law has been ever made to repeal it? But in the city of *London*, where the mayor and alderman had the care of orphans, they, by that ſole authority and power, have preſerved this part of the common law in *London*, which is diſuſed and diſapproved every where elſe.

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1 Wms. 710.

* And he ſaid, this differed from the caſe of *Frederick* and *Frederick*, where the father had expreſsly covenanted to make himſelf a freeman of *London*, which was intended to let in the children of that marriage into the cuſtomary ſhare, as a proviſion for them; and he, though frequently applied to for that purpoſe, refuſed to do it, which turned the fraud on his ſide; and ſo the bill was diſmiſſed, ſave only, that the defendants were to give ſecurity to anſwer the intereſt of the 400*l.* during the plaintiff's wife's life.

Anonymous.

Anonymous.

Caſe 359.

Eodem Die.

In court Lord Chancellor.

A. ſeiſed of an eſtate of 600 *l. per ann.* deviſes 300 *l. per ann.* to an infant, whoſe father was his heir at law, and the other 300 *l. per ann.* he deviſes to the father, for his care in looking after the ſon's eſtate till he ſhould come to the age of 21: the father dies, leaving the ſon ſix years of age,

ONE ſeiſed of an eſtate of 600 *l. per ann.* deviſed 300 *l. per ann.* of it to an infant, whoſe father was his heir at law; and the other 300 *l. per ann.* he deviſed to the father, for his care and pains in looking after the ſon's eſtate till he ſhould come to the age of 21 years: the father died, leaving his ſon an infant of ſix years of age; but by his will deviſed this 300 *l. per ann.* to the defendant his wife, and deſired her to ſave what ſhe could out of it as a portion for his daughter, *and appointed her guardian of his ſon*; and the only queſtion was, Whether the wife was to have the 300 *l.* a year till the ſon came to the age of 21 years, or *whether this was ſuch a perſonal truſt in the father* as died with him?

having by will deviſed this 300 *l.* to his wife, and deſired her to ſave what ſhe could out of it for a portion for his daughter, and appointed her guardian of his ſon; this 300 *l. per ann.* does not determine by the father's death, but the wife ſhall have it till the ſon arrives to the age of 21.

Lord Chancellor was clear of opinion, that the father, being guardian by nature, would have been bound to have taken care of his ſon, and of his eſtate, though he had not been ſo appointed, and that he being ſo appointed, was the only perſon that could extend his care as a guardian after his own death; that he had *by law a power to appoint a guardian over his children*, * and though he was now dead, *yet he ſtill, by the guardian which he had appointed, took care of his ſon*; *and therefore this* 300 *l. per ann. being given him till his ſon ſhould attain the age of* 21 *years, did not determine by his death, but was an abſolute intereſt in him for that time, which he might diſpoſe of as he thought fit*; and that it could not determine neither by his wife's death, unleſs in caſe of any determination thereof for want of care of the ſon, or of his eſtate, which when that happened to be the caſe, the ſon might complain.

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A TABLE OF THE PRINCIPAL MATTERS CONTAINED IN THE FOREGOING CASES.

Abatement.

IF the Attorney General of the Dutchy Court exhibits an information in behalf of part-owner of coal-mines, the relator's death abates the ſuit *Page* 13

After a decree to account, and abatement of the ſuit by the defendant's death, his repreſentative may revive 197

Account and Diſcount.

Where on a bill to call a truſtee to account, he by anſwer ſubmits readily to it, though found in debt, ſhall pay intereſt for the balance only from the time of the account liquidated, and no coſts; *ſecùs*, if he controverts the account, there, if found in arrear, ſhall pay intereſt and coſt *Page* 254

A receiver to the guardian of an infant, who has his account allowed him by the guardian, ſhall not be obliged to account over again to the infant when he comes of age 535

A. a clothier, and *B.* a dyer, had mutual dealing in the way of their trade, which were carried on for ſeveral years without payment of money on either ſide, *B.* dies inteſtate, and indebted to others by ſpecialties, who as principal creditors take out adminiſtration to him, and ſue *A.* at law. Equity will enjoin the action, and order an account; and that *A.* ſhall be allowed by way of diſcount what was due to him from *B.* 580

Admi-

Adminiſtrator. Vide Executors, Aſſets.

Advowſon and Avoidance.

Decree againſt a mortgagee in poſſeſſion to redeem; but before the account taken, a church becoming void, mortgagee preſents; yet on petition ordered to revoke his preſentation *Page* 71

A. mortgages a manor (to which an advowſon was appendant) in fee to *B.* and then *A.* preſents *C.* by ſimony; and *C.* being for that reaſon refuſed by the biſhop, *A.* preſents *D.* who is admitted, *&c.* but after reſigns, and is again preſented by *A.* and *B.*; the relator, having got an aſſignment of the king's title for the ſimony, brings his *quare impedit*, and a bill in this court, that the mortgage may not be ſet up nor given in evidence againſt him at law, and decreed accordingly 214

Affidavit.

A peereſs ordered to produce deeds confeſſed in her anſwer, on honour only, not on oath 92

When a bill is exhibited for a general diſcovery of deeds, not neceſſary for the plaintiff to annex the uſual affidavit, that he has them not in his cuſtody 536

Agreements.

Equity will not relieve againſt the terms of an agreement, though it may ſeem in nature of a penalty 102

A court of equity will not decree a ſpecific execution of articles, where they appear to be unreaſonable, or founded on fraud 538

A. articles with *B.* for the purchaſe of an eſtate of 180 *l. per ann.* for which he was to give 35 years purchaſe, and pays 50 *l.* in part; but diſcovering that 30 *l. per ann.* of the lands were copyhold, refuſed to go on: on a bill by *B.* equity will not decree a ſpecific execution of this agreement, being unequitable, but will order the 50 *l.* to be paid back *Page* 575

Voluntary Agreements. Vide Fraud, Debts, Creditor and Debtor.

A. makes a voluntary ſettlement on *B.* who after agrees to deliver it up without conſideration; this agreement ſhall bind in equity, for a voluntary ſettlement may be ſurrendered voluntarily 69

A huſband, who had made no proviſion for his wife, agrees that her fortune, which was in truſtees hands, ſhould be laid out in a purchaſe of lands; this agreement, though after marriage, not to be conſidered as voluntary, ſo as to be ſet aſide in favour of a creditor of the huſband 22

Agreements within the Statute of Frauds and Perjuries.

Sealing not neceſſary to bring an agreement out of the Statute of Frauds 16

If, on a bill brought to have execution of a parol agreement, the defendant by anſwer confeſſes the agreement, without inſiſting on the Statute of Frauds, *&c.* the court will decree an execution, becauſe no danger of perjury 208, 374

On a marriage treaty, the intended huſband and young lady's father went to a counſellor's chambers, to have, in conſideration of the portion the father propoſed to give, a ſettlement drawn; minutes of the agreement were taken down in writing by the counſel, and given by him to his clerk, to be drawn up in form: the next day the father dies, and the day following the marriage was ſolemnized. This agreement,

agreement, notwithſtanding theſe preparations, held to be within the Statute of Frauds and Perjuries *Page* 402

An agreement, though not in writing, being executed on one part, and an enjoyment accordingly, equity won't deſtroy it 519

A. agrees with *B.* a broker for 5000 *l.* *South-Sea* ſtock; the broker according to uſage made an entry of this agreement in his pocket-book, it being no otherwiſe reduced into writing, is within the Statute of Frauds 533

In pleading the Statute of Frauds it is neceſſary to ſay, that the agreement was not reduced into writing 533

A. agrees with *B.* for the purchaſe of nine houſes which were in mortgage to *J. S.* and pays him a guinea in earneſt; *B.* writes a note to *J. S.* and deſires him to deliver up the writings, he having diſpoſed of them, which *J. S.* refuſed, unleſs all the mortgage money was paid him down, and afterwards purchaſes them himſelf; on a bill brought by *A.* for a ſpecifick execution of the agreement, it was held that neither the guinea paid down, nor the note, (which was only an evidence of aſſent, but did not aſcertain the terms of the agreement) were ſufficient to take it out of the Statute of Frauds and Perjuries 560

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Upon an appeal from the Rolls, or to the Houſe of Lords, no new matter to be inſiſted upon 295, 496

Apportionment. Vide **Average.**

Army.

If the colonel of the army makes an aſſignment of the off-reckonings of any year for the clothing of that year, and has before anticipated theſe off-reckonings of that year, for the clothing of the foregoing year, he ſhall be anſwerable in his own perſon, if the agreement be ſo worded as to charge him, and that the off-reckonings of the following year are ſo far diverted by altering the eſtabliſhment of the regiment, as not to be applicable to make good theſe payments *Page* 143

Arbitrators. Vide **Award.**

Aſſets. Vide **Executors.**

Tenant in tail ſuffers a recovery to let in a mortgage of 500 years, and then limits the eſtate to the old uſes, and by will deviſes all his lands for payment of debts, the equity of redemption of the mortgage held aſſets to ſatisfy creditors 39

A. indebted to *B.* 300 *l.* in conſideration of a ſettlement on him by *A.* after his death gives bond to *C.* in truſt for *A.* to pay 500 *l.* as *A.* ſhould by his will direct; *A.* directs the 500 *l.* to be paid to *C.* and makes him executor; on his ſuing this bond, and a bill brought by *B.* this 500 *l.* held aſſets in *B.*'s hands to pay what was due to him 52

Where lands are deviſed to executors to be ſold for payment of debts, the money becomes legal aſſets, and debts ſhall be paid in a courſe of adminiſtration 127, 136

A. on his marriage creates a term in truſt to raiſe 6000 *l.* of which 3000 *l.* was for his younger children, and the other 3000 *l.* as he ſhould appoint; after, he appoints the 3000 *l.* as a collateral ſecurity to *J. S.* and by will deviſes it, and the other 3000 *l.* to his daughter, yet held that it ſhould be aſſets to ſatisfy a bond creditor 232

Aſſignment and Aſſignee.

One being in an undue manner drawn in

in to execute a conveyance of his eſtate, after makes his will, and thereby deviſes all his land to be ſold for payment of his debts, his creditors may ſet aſide the conveyance, having a right in nature of an equity of redemption, as the teſtator himſelf had, though urged that it was in nature of a *choſe in action*, and not aſſignable *Page* 142

Aſſignee of a perſonal contract for liberty of bringing water to the city of *London*, chargeable in equity with the covenants in the original leaſe or contract, as an equitable aſſignee upon an equitable privity of eſtate, like the aſſignee of a bond 156

Attorney and Solicitor. Vide Scrivener.

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What proportion tenant for life ſhall bear of incumbrances on the eſtate 21

An eſtate in mortgage ſettled on *A.* for life, remainder to *B.* in fee, tenant for life ſhall bear two fifths of the principal and intereſt, and the remainder-man three fifths 44

A creditor who obtains judgment after the debtor has made a conveyance of his eſtate for payment of his debts, ſhall be paid only in average 310

A freeman of *London*, having iſſue two daughters, deviſes 6000 *l.* apiece to them, and makes his wife executrix; by an eſtimate it appeared that his perſonal eſtate at his death was 18000 *l.* to 6000 *l.* of which, the widow being entitled, *A.* her ſecond huſband, in conſideration thereof, ſettled a jointure of 600 *l. per ann.* Afterwards a loſs of 12000 *l.* befel the freeman's eſtate, and though the wife was dead, and it was urged that the ſecond huſband was a purchaſer of her fortune, yet decreed, that the daughters ſhould have a proportionable recompence out of the 6000 *l.* *Page* 431

Authority. Vide Power.

One being indebted to *B.* makes a letter of attorney to him, to receive all ſuch wages, as ſhall after become due to him, then goes to ſea and dies; this authority is determined ſo, that he cannot compel an account of wages, if any due, at making the letter of attorney, much leſs of what after became due; but the adminiſtrator muſt pay according to the courſe of law 125

Award.

One of the parties to an award, made on a ſubmiſſion in court, purſuant to the late act of parliament, dies before the money paid, no *Sci. Fa.* can iſſue againſt his heir or executor, to inforce payment, for the award, though eſtabliſhed by the court, is not in nature of a judgment or decree to be proſecuted, but in nature of a contempt, which dies with the perſon, and ſo held all the judges 223

Bankrupt.

A. Puts out 1000 *l.* at intereſt to the *Eaſt India Company*, and takes bond for it in the name of *J. S.* his wife's relation. *A.* becomes a bankrupt, *J. S.* is ſummoned before the commiſſioners; before examination, he tells the *Eaſt India Company*, that the money was not his, but that they ſhould pay it to the perſon that brought the bond; *A.*'s wife brings the bond, and has the money paid here; equity will not relieve againſt it 18

Baron and Feme. Vide Paraphernalia.

Where the husband may be plaintiff against the wife in equity *Page* 24

The wife's portion, though out on bond or mortgage which by law survives to her, shall yet in equity be subject to the husband's bond debts, to ease the heir, where a settlement is made on the wife; for that makes the husband a purchaser of her fortune, and it shall go to his executors; but if the settlement were only in consideration of part of the fortune, then the remaining part out on bond shall survive to the wife, unless there were an express agreement, that the husband should have it 63

A feme covert being drawn in by fraud to enter into articles, for upplying the defect of a surrender of copyhold lands, these articles not allowed to be carried into execution 76

Probate of a feme covert's will, (who has power given her by the husband to make one) good *pro testes* 84

Divorce *a mensa & thoro*, if it continued during the coverture, equity will not assist the wife in recovering her dower, but will leave her to the law; neither will the Spiritual Court grant her administration, nor Chancery decree her a distributive share 111

A feme covert being entitled to 400 *l.* on a mortgage in fee, husband articles to lay out this money on a purchase of lands, to be settled as a provision for him and his wife, and their issue; the wife dies without issue, the husband takes administration to her, and by will devises this money to the plaintiffs before payment of it, and dies; on a bill brought against the administrator *de bonis non*, &c. of the wife, held there would be no relief, the law being with the defendants: this money belonged to the administrator *de bonis non*, &c. of the wife, and is distributable amongst her next of kin *Page* 118

Where a wife may be proceeded against without her husband, he not being amenable by the process of the court 328

A. purchases a copyhold in his own, his wife and daughter's names, and afterwards surrenders it for securing a debt to *J. S. J. S.* not entitled to any part of the lands, it being an advancement for the wife and daughter, and the husband and wife taking one part thereof by intireties 1

A man before marriage gives bond to the woman, to leave her 1000 *l.* if she survives him, and then marries her, and dies intestate, and his estate both free and copyhold, being all in mortgage, she takes out administration, and on a bill against the heir and mortgagee, was let into a redemption of the whole, though the bond was released and gone at law by the intermarriage, and though the copyhold not affected by the bond, it being in nature of a marriage agreement 237

A feme covert, who makes profit of a real or personal estate, settled to her separate use, may dispose of such profit as she pleases 255

Term raised to pay 200 *l. per ann.* pin-money to the wife, with covenants from the husband for payment of it; a year's arrear at the husband's death held such a debt, as should be charged on his trust estate, settled for payment of his debts 26

A feme covert, who has pin-money or a settled maintenance settled on her, may by writing in nature of a will, dispose of what she saves out of it, and such disposition shall bind the husband 44

A woman having 1200 *l.* in possession, and 1200 *l.* in the chamber of *London*, on her marriage, the husband's father, in consideration of this fortune, settles 240 *l. per ann.* jointure on her; the husband dies, and the wife administers to him, and the representatives of the husband's father bring a bill for

for the 1200*l.* in the chamber of *London*, the father being, as alledged, a purchaſer of it by the ſettlement: bill diſmiſſed, the huſband having done nothing to alter the property in his life *Page* 209

Feme inheritrix, raiſes a term for 1000 years in truſt for the huſband for life, then for their children, if any, their executors and adminiſtrators; and if the wife ſurvives, in truſt for her, her executors and adminiſtrators; the huſband dies without iſſue, the wife marries a ſecond huſband and dies, the huſband takes out adminiſtration to her, yet decreed, that the term ſhould attend the inheritance 252

An executrix or adminiſtratrix waſtes the perſonal eſtate, and then marries and dies; the huſband ſhall be chargeable in equity to anſwer it in nature of a debt, ſo far as any fortune of his wife's comes to his hands will extend, unleſs he had made a ſettlement on her adequate to that fortune, without notice of the debts or devaſtavits 225

Where the wife's portion charged by will on certain lands, purſuant to a power in a ſettlement, ſhall go to the adminiſtrator of the huſband, and not to the adminiſtrator of the wife, though the huſband and wife are both dead, and the portion not raiſed 312

Where the wife's fortune, though the huſband made no ſettlement on her, ſhall go to the creditors and repreſentatives of the huſband, and not to the repreſentatives of the wife 412

Huſband and wife having iſſue one daughter, join in a conveyance of the wife's land, and agree that 600*l.* part of the purchaſe-money, ſhould be ſettled in manner following, *viz. thirty pound a year, the intereſt thereof to be paid the huſband, during his life, and after his death, to his wife for life, and after both their deaths, to ſuch daughter or daughters, as ſhall be begotten between them, till they ſhall attain their reſpective ages of* 21, *or be married, and then the principal ſum to ſuch daughter or daughters; but in caſe there ſhall be no daughter, then to the ſurvivor of the huſband or wife.* *A.* married the daughter, and in conſideration of this 600*l.* made a ſettlement on her; the daughter died in the life-time of the father and mother, and ſoon after the mother died without iſſue, the huſband entitled to it as her adminiſtrator *Page* 489

A wife can't, either by herſelf, or her *Prochein Amy*, bring a *Homine Replegiando* againſt her huſband 492

Though tradeſmen who truſt a married woman with neceſſaries ſuitable to the degree and quality of the huſband, ſhall recover of the huſband; yet if any perſon lends her money, which is actually laid out in neceſſaries, they can't ſue the huſband, but equity will ſuffer ſuch perſons to ſtand in the place of thoſe, of whom ſuch neceſſaries were bought 502

Alimony and Separate Maintenance.

By marriage articles, 6000*l.* of the wife's portion was to be laid out in a purchaſe of lands, to be ſettled on the huſband for life, then on the wife for life, and to lie in the Bank till the purchaſe made: before the purchaſe was made, the wife, by the ill uſage of the huſband, being forced to leave him, had the intereſt of this money allowed her, in nature of alimony 239

In what caſes a court of equity will decree a wife alimony, though ſhe may have a ſentence for it in the Spiritual Court 496

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Equity will not ſupply the want of a ſurrender, in behalf of a baſtard child 475

Bill. Vide Proceedings.

Bills to examine witneſſes, *in perpetuam rei memoriam* *Page* 531

Bonds and Obligations.

A. bound to *B.* in a bond of 1000 *l.* for payment of 500 *l.* after *A.* and *C.* as his ſurety, give a bond to *B.* of 200 *l.* for payment of 100 *l.* as a farther ſecurity for ſo much of the 500 *l.* Then *A.* aſſigns a judgment to *B.* of 500 *l.* towards farther ſatisfaction of the debt, and *B.* receives ſeveral ſums on this judgment, and *A.* by conſent of *B.* receives 80 *l.* alſo part of the money ſecured on this judgment; this ſhall not go in exoneration of any part of the money ſecured by the 200 *l.* bond, as it would do, if *B.* had actually received it, and lent it to *A.* 178

One executes a voluntary bond of 5000 *l.* to one of his daughters, without any condition, and payable immediately, but always kept it by him, and it was proved to be made to ſcreen himſelf from taxes, and ſo eſteemed by that daughter; and he by will, gives portions to all his daughters, and dies, this bond decreed to be ſet aſide 182

Bond extinguiſhed at law, ſet up in equity 237

A. agrees to be bound in a bond, as ſurety to *B.* and ſigns and ſeals it accordingly; but by the neglect of the clerk, *A.*'s name was not inſerted; the obligee ſhews *A.* the condition, and his name and ſeal, demands payment, and threatens to ſue him, unleſs he would give freſh ſecurity, which *A.* agrees to; but after, finding the miſtake, refuſed, not being bound by law, yet equity will compel him 309

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TENANT in tail, without levying a fine, or ſuffering a recovery, may appoint to a charity, and it ſhall bind him in remainder *Page* 16

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Lands of 8 *l. per ann.* purchaſed by a pariſh in truſt for charitable uſes, by building, *&c.* improve to 450 *l. per ann.* and the truſtees, by order of the veſtry for 1000 *l.* for the uſe of the pariſh, make this eſtate a ſecurity for 100 *l. per ann.* annuity, and the pariſhioners would ſet aſide this agreement, as a breach of their charity, but their bill diſmiſſed 225

A will wanting witneſſes, will not operate as an appointment to a charity by the 43 *Eliz.* 270, 389

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Church-wardens having by order of veſtry, laid out ſeveral ſums for repairs of the church, and building two new galleries, and having at going out of their offices their accounts taken by auditors, and paſſed and allowed by the veſtry, and an order of veſtry, for making a rate to reimburſe them, brought a bill againſt the ſucceeding church-wardens, to enforce the making ſuch rate; but thoſe church-wardens being likewiſe removed, after examination of witneſſes, and publication paſſed, held a good objection at the hearing, and that they had no remedy, but in the Spiritual Court, or againſt the pariſhioners in particular, who employed them 42

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A. had iſſue three ſons, *B.* his eldeſt, who died in his life-time, leaving a daughter, and *C.* and *D.* *A.* deviſes lands to his wife for life, and after her death to *D.* and his heirs, provided that if *C.* do within three months after the death of the wife, pay to *D.* the ſum of 500*l.* then the lands to remain to *C.* and his heirs; *C.* died in the life-time of the wife, the heirs of *C.* ſhall take advantage of this condition, and not the right heirs of the teſtator 486
A. having iſſue three daughters, *B. C.* and *D.* deviſes 1000*l.* to *B.* to be paid her at the age of 21, or marriage, upon condition that ſhe married with the conſent of his executors, and likewiſe deviſes to her ſeveral meſſuages, *&c.* and after ſeveral other legacies, he deviſes the reſidue of his eſtate to the executors, for the benefit of his children, though *B.* married a perſon, who made his addreſſes to her in his father's life-time, which the father knew, and was diſſatisfied at, and had notice by the executors of the father's will, yet there being no limitation over, this won't amount to a forfeiture, being only *in terrorem* 562

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A court of equity will not aſſiſt a copyholder, againſt a forfeiture, which is found ſuch at law, unleſs in caſes where a compenſation can be made *Page* 568

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After ſervice of a writ of execution of a decree againſt a corporation, the next proceſs is a Diſtringas, and after that, a ſequeſtration, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the Diſtringas, which iſſues for that very purpoſe, to compel them to appear; but the appearing being paſt, the proceſs muſt go on, becauſe the appearance being only in favour of liberty, can be of no ſervice to a corporation, which cannot be committed 128

Covenants.

Baron and feme grant a watercourſe through the feme's lands, with covenants for them, their heirs and aſſigns, to cleanſe and keep it in repair, and ſuffer a common recovery to eſtabliſh the grant; this is not a perſonal covenant, as to the baron and feme, but a covenant which runs with the land, and ſhall bind the aſſignees, being made good by the recovery 39

Coſts.

Plaintiff's daughters by a ſecond *Venter*, brought their bill againſt the defendant's daughters by a firſt *Venter*, to prove their father's will, whereby lands were deviſed to be ſold, to raiſe plaintiffs portions; and on a trial at bar, and verdict for the will, defendants ordered to join in a ſale, but were allowed their coſts, both at law and in equity 93
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The Spiritual Courts cannot oblige a guardian to pay intereſt for the infant's money in his hands, though they will compel him to give ſecurity, but Chancery will do both 547

Chancery will grant an injunction to ſtay the huſband's preceedings in the Spiritual Court, for a legacy given to his wife, becauſe that court cannot oblige him to make an adequate proviſion on her 548

Debts. Creditor and Debtor.

ONE deviſes all his real and perſonal eſtate for payment of his debts and legacies, and dies; a creditor obtains judgment againſt the executor, and then he and ſome other creditors, who had not obtained judgments, bring their bill, and had a decree for ſale of the eſtate, and to be paid their debts in proportion; the judgment-creditor received ſeveral dividends, after having proved his debt before the Maſter, then petitioned for a rehearing, upon pretence, that he being a judgment-creditor, ought to have a preference before the other creditors, at leaſt, out of the perſonal eſtate; but the other creditors having joined in the bill, and contributed to the charges of the ſuit, and ſeveral dividends being made, purſuant to a decree, the court would not alter it; and held, that if any preferences were to be, the plaintiff ought to bring what he received into Hotchpot, and that he ought to take either all law or all equity *Page* 190

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One by will, deviſes the ſurplus, after debts and legacies paid, to his wife, and makes *A.* and *B.* his executors; the creditors compound for leſs than their full debts, from an apprehenſion there was not aſſets, but aſſets afterwards came in: on a bill by the wife, for an account of the ſurplus, the executors would have let in the creditors to their full debts, which would have reduced the ſurplus to little; but the court would not ſet aſide this compoſition,

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A feme purchaſes a church leaſe to her and her heirs, for three lives and dies, leaving an infant daughter, two of the lives die, the infant's guardian renews the leaſe; this is a new acquiſition, and ſhall go to the heirs of the part of the father *Page* 319
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Deviſe.

Deviſe of lands to *A.* for life, remainder to ſuch child or children as ſhould be living at his death, and to their heirs, *A.* paying 40 *l.* to *B.* this is a charge not only on *A.*'s eſtate for life, but alſo on the remainder 27
One deviſes all his goods, chattels, and eſtate whatſoever, on condition to pay his debts and legacies, theſe words paſs his real eſtate, he having by will deviſed a conſiderable legacy to his eldeſt ſon, and other legacies, and the ſurplus of his eſtate, after his wife's death, to be equally divided between his four children 37
If lands are deviſed to one generally, he takes but an eſtate for life, unleſs it appear plainly, the teſtator intended him a greater, or that he is like to be a loſer, or his perſon chargeable 68
A. ſeiſed in fee, deviſes *Black Acre* to *B.* for life, and deviſes to *C.* all his lands, not before deviſed, to be ſold for payment of debts, by this deviſe of all his lands, *&c.* the reverſion of *Black Acre* paſſes to *C.* 202
A. deviſes 50 *l.* to his heir at law, and gives his wife all the reſt and reſidue of his real and perſonal eſtate, and makes her executrix, theſe words paſs a fee to the wife 264
Lands articled for, paſs by a deviſe of all a man's lands, eſpecially if the teſtator had no other lands 320
Deviſe of lands to *A.* and the heirs male of his body; *A.* dies in the life-time of the teſtator, leaving iſſue, the deviſe is void, and the iſſue cannot take 440
A. deviſes lands to the Drapers Company in truſt, to convey to *B.* for life; remainder to his firſt, *&c.* ſons, for their lives ſucceſſively, and ſo to their

their iſſue male for their lives only, though this be a vain attempt to create a perpetuity, yet the truſtees ſhall make as ſtrict a ſettlement, as may be, making all the perſons in being, but tenants for life, but the limitation to the ſon unborn muſt be in tail *Page* 455

A. deviſes to her niece in this manner, *I make my niece* G. *executrix of all my goods, lands and chattels*, and dies, not having any leaſehold intereſt, yet her lands of inheritance paſs not by theſe words 471

Deviſe for Payment of Debts.

Deviſe of the rents and profits of lands, till his ſon attain 21, towards payment of debts, and if my ſon die before 21, my debts being paid, then to *A.* The ſon dies before 21, yet the rents and profits not only till he would have attained 21, but alſo beyond, till the debts be paid, ſhall be applied for that purpoſe 34

A. deviſes in theſe words. *Imprimis, I will and deviſe, that all my debts and legacies and funerals, ſhall be paid and ſatisfied in the firſt place*; theſe words amount to a charge on the real eſtate, if the perſonal is not ſufficient for that purpoſe 430

A man by will, recites his debts, and then ſubjects his real eſtate for the payment thereof, though he is miſtaken in ſome of the ſums recited, yet all his debts ſhall be paid 10

Where the teſtator makes a particular proviſion out of his real eſtate, for the payment of his debts, the perſonal eſtate ſhall not be liable to them 451

A man has iſſue a ſon and four daughters, he ſettles lands on himſelf for life, remainder for 21 years, for raiſing 5000 *l.* daughters portions, 2000 *l.* whereof to be paid the eldeſt; remainder to the ſon in tail; remainder to himſelf in fee; the ſon dies without iſſue, and after, the father deviſes the land to his four daughters equally, yet held, that the eldeſt ſhould have 1000 *l.* more than any of the reſt *Page* 5

A. deviſed a term for years to his wife for life, and after her death, to the child ſhe was then *enſient* with; but if ſuch child died before 21, then he deviſes one third part of the ſaid term to his wife, whom he made executrix: the wife not being *enſient* at the time of the deviſe, held firſt, That the deviſe to her was good, though the contingency never happened. Secondly, That ſhe ſhould have the undiſpoſed ſurplus of the perſonal eſtate, and not to go in a courſe of adminiſtration 316

A. deviſes lands in truſt, after debts paid, to convey the premiſſes to the heirs male of the body of *B.* the teſtator's great-grandfather, *C.* is the heir male of the body of *B.* but not heir general, there being a daughter of an elder brother, who is heir general. Whether the truſtees are to convey to *C.* as *C.* would be well entitled to take as heir male by deſcent, ſo he is ſufficiently deſcribed to take by purchaſe 442, 461

By a deviſe to children and grandchildren, none can take but thoſe who are in *eſſe* at the time of the making of the will, unleſs there are future words, which ſhew the teſtator's intent 470

One deviſes to his wife for life; remainder to his grand-daughter, who was heir at law, for life; remainder to his own heirs male: a nephew, although he be next heir male, cannot take by virtue of this laſt limitation, not having both parts of the deſcription verified in him 589

Deviſe of the Perſonal Eſtate.

A. deviſes to his wife 1200 *l.* and gives her all the goods, chattels, plate, jewels, houſhold-ſtuff, and ſtock belonging to houſe at *N.* 400 *l.* which the

the teſtator had in ready money in the houſe, will not paſs *Page* 8
One ſettles a houſe on his daughter for life, with remainders over, and then by will deviſes the goods and furniture of the houſe, to ſuch perſons as were to have the houſe after his death; by the ſettlement, the goods and furniture ſhall go according to the deviſe, and ſhall not be under the power of the firſt taker to diſpoſe of, nor ſubject to her or her huſband's debts 26
A. deviſes to his nephew 5 *l. per ann.* (without ſaying to his executors or adminiſtrators) to be paid him during his the teſtator's, wife's life, whom he made executrix, on condition, that he demeaned himſelf civilly to her; by his death, the 5 *l. per ann.* is determined 173
By a deviſe of all rings and houſhold goods, plate uſed in the houſe, does not paſs 207
A deviſe of the furniture and pictures at the houſes, *A. B.* and *C.* paſſes not plate, which the teſtator conſtantly uſed, and removed with him, when he went from one houſe to another 251

Executory Deviſe. Vide **Remainder.**

A deviſe of a term to *A.* his heirs, executors and aſſigns for ever, but if he die before 21, without iſſue, remainder over; this remainder is good 15, 96
One deviſes all his lands, after the death of his executors to *A.* and his heirs for ever, but if he die, leaving no ſon, then to *B.* this is a good executory deviſe to *B.* if *A.* dies without iſſue, becauſe the contingency muſt happen within the compaſs of a life 67
Limitation of a fee upon a fee on a contingency to happen within a reaſonable compaſs of time, no perpetuity 72

Diſtreſs.

The ſervants of a grazier, driving of a flock of ſheep to *London*, are encouraged by an innkeeper, to put the ſheep into paſture-grounds belonging to the inn; the landlord ſeeing the ſheep, conſents they ſhall ſtay there one night, and then diſtrains them for rent; grazier relieved againſt this diſtreſs *Page* 7
There being 20 years of a rent-charge in arrear, the cattle of a neighbour came on the lands, out of which it iſſued, and were diſtrained, but equity relieved 8

Diſtribution.

A perſon dies inteſtate, leaving one child, the whole perſonal eſtate belongs to him, within the Statute of Diſtributions 21
The ſon of a dead uncle not entitled to a diſtribution with a living uncle 28
A. has three brothers, one dies, leaving two children, another three, and the third five; then *A.* dies inteſtate; the diſtribution ſhall be *per Capita*, and not *per Stirpes*, being all next of kin in equal degree 54
A. deviſes to *B.* and *C.* his wife's children, (as he called them, not owning them to be his) 10*s.* apiece, and no more, and gave the children that he owned conſiderable legacies: *B.* and *C.* ſhall come in for a ſhare of the undiſpoſed ſurplus, for the words of excluſion muſt be taken ſtrictly 169
A man deviſes his perſonal eſtate to the uſe of his relations, without ſpecifying any in particular, it ſhall be diſtributed according to the Statute of Diſtributions 401
The grandmother is entitled to a diſtribution of the grandchild's perſonal eſtate, in excluſion of the uncles and aunts 527
The degrees of proximity in the conſtruction of the Statute of Diſtributions; the degrees of proximity are to be computed according to the civil law, and not the canon law 593

Donatio Cauſa Mortis.

Donatio Cauſa Mortis, what it is, *Page* 269

The nature of a *Donatio Cauſa Mortis*, in what it differs from a will, the evidence to prove it muſt be very ſtrong 300

Dower.

A dowreſs ſhall not have the aſſiſtance of a court of equity, to ſet aſide a term for years againſt a purchaſer, *ſecùs* of a jointreſs; but againſt an heir at law, a dowreſs has been let in 65, 97

Deviſe of lands to a man's wife, who was entitled to dower, without ſaying in recompence or ſatisfaction of her dower, held to be a voluntary giſt, and no bar of dower 133

Where equity will remove a ſatisfied mortgage againſt the heir, in favour of a dowreſs 133

A dowreſs has a right to redeem a mortgage, and hold over till ſatisfied 137

A dowreſs ſhall have the truſt of a ſatisfied term removed againſt the heir at law 241

A man before his marriage, veſts the legal eſtate in truſtees, in truſt for him and his heirs, equity will not aſſiſt the wife in recovering her dower 336

Equality.

IF a man gives his wife power to divide his eſtate amongſt his three children, ſhe muſt do it equally 256

Equity.

Equity will not relieve againſt the terms of an agreement, though it may ſeem in nature of a penalty 102

Whether equity can give relief on the Statute againſt Fraudulent Deviſes, being introduction of a new law *Page* 198

A matter examinable, and already determined at law, yet equity may give relief in it 233

Equity has power over truſt-money, and may therefore decree it a wife for alimony 239

Equity will permit a deviſee of lands, upon condition to pay ſeveral ſums of money at a ſtated time, to cut down timber for that purpoſe, during the life of a jointreſs 15

One covenants on marriage articles to pay 10000*l.* within ſix months after his death, and after growing old and infirm, covenantee would have obliged him to have given ſecurity, but the court held, that they would not alter this agreement of the parties, or make it better than they themſelves had, and though executors might be obliged to give better ſecurity for legacies, payable *in futuro*, that is, becauſe they are in nature of truſtees, and there is no agreement one way or another 89

Plaintiff had ſeduced his wife's ſiſter, and had ſeveral children by her, and gave her ſome bonds for payment of money, as a proviſion for her, and her children; and theſe bonds being ſued, he brought a bill, ſuggeſting that the bonds were given for no valuable conſideration, but was diſmiſſed with good coſts, having no ſort of equity 114

Where one recovered in trover againſt a ſervant of the *African* company, equity would not relieve, becauſe plaintiff in equity, might at law have defended himſelf, but decreed, that the company ſhould indemnify the ſervant, and that the plaintiff at law (one of the defendants in equity) might proſecute the decree in the ſervant's name 221

Equity will not decree meſne profits, unleſs in caſe of an infant, or ſome other particular circumſtances 252

Equity will not relieve againſt ſuch ſecurities, as the party voluntarily enters into,

into, though it will againſt the penalty *Page* 266

Equity will relieve againſt one who agreed to enter into bond as ſurety, though by miſtake, he was not bound by law 309

In equity, money is ſometimes conſidered as land, and lands as money 400 *Vid.* 543

A court of equity will not only grant an injunction to ſtay tenant for life, without impeachment of waſte, from defacing the manſion-houſe, but will likewiſe oblige him to put it in the ſame plight 454

Equity, in ſome caſes, will quiet men in their poſſeſſions, though they have not eſtabliſhed their right 531

Eſtate.

Lands are deviſed to truſtees to ſell, and out of the money ariſing by the ſale, among other ſums, to pay to his heir at law 100 *l.* and no diſpoſition is made by the teſtator of the ſurplus of his eſtate, the land ſhall not be turned into perſonal eſtate, nor more ſold than is neceſſary to pay the legacies, and the heir ſhall have the ſurplus 162 *Vid.* 541

Mortgage, when to be conſidered as real, when as perſonal eſtate 265

Real eſtate made liable to a legacy, the perſonal not proving ſufficient 288, 449

Perſonal Eſtate, when to be applied in Eaſe of the Real.

A. makes *B.* his executor, and deviſes to him 20 *l.* and his real eſtate to *J. N.* upon condition that he pay his debts and legacies; in this caſe, the perſonal eſtate ſhall be applied in eaſe of the real, in diſcharging the debts and legacies 2

Hæres factus of the whole eſtate, ſhall have the benefit of the perſonal eſtate, but a deviſee of particular lands ſhall not *Page* 3. *Vid.* 477

One deviſes his real eſtate for the payment of his debts, and the overplus he gives to his ſiſters, and deviſes his perſonal eſtate to his wife, whom he makes executrix; the wife ſhall have the perſonal eſtate exempt from debts 101, 457

Evidence, Witneſs, and Proof.

One witneſs againſt the defendant's anſwer, not ſufficient to ground a decree on 19

Exemplification of part of a patent not ſuffered to be read in evidence 59

One having order to prove a deed *viva voce*, at the hearing not allowed to prove the witneſſes hands, they being dead, but had leave to examine in the office to prove the deed, though publication was paſſed 64

Counterpart of a ſettlement, admitted ſufficient evidence of the ſettlement, and a conveyance decreed purſuant to it 116

Depoſitions taken in a cauſe wherein tenant in tail, or the father, is only tenant for life, remainder to the ſon, cannot be read againſt the ſon 212

No proofs to be read in the Houſe of Lords, which were not made uſe of in Chancery 212

The anſwer of a ſuperannuated perſon, put in by guardian, ſhall be read againſt him, as an anſwer of one of full age, *ſecùs* of an infant who is to have a day to ſhew cauſe 229

Parol evidence admitted to aſcertain the perſon, the teſtator intended ſhould take a legacy 229

A witneſs incompetent being intereſted, may, on a releaſe given him, whereby he becomes diſintereſted, be examined again; ſo a witneſs at the hearing, rejected to be read becauſe intereſted, yet on a releaſe given, was examined again on the account, and allowed good on exceptions to a Maſter's report 234

A plaintiff

A plaintiff in a cauſe, cannot be made a witneſs, but a defendant may, becauſe he is forced into the cauſe *Page* 411

Executor and Adminiſtrator.

Six hundred pounds allowed for funerals, in reſpect of the teſtator's quality, and being buried in his own country 27

An executrix having money in the hands of *J. S.* to a ſhare, whereof ſhe was entitled in her own right, intruſts *J. S.* to put it out at intereſt for her, which he does, and the ſecurity proves defective, ſhe ſhall not anſwer the loſs to the other legatees or ſharers 49

Executors who all join in a ſale, ſhall be all charged, though one only receives the money, *ſecùs* of truſtees 173

Where an executor may retain 179 *Vide* Retainer.

After a bill and anſwer put in, the executor voluntarily paid a bond debt, and allowed on the account, becauſe he might by confeſſing judgment, have preferred him, and no difference in reaſon where paid without ſuch confeſſing 188

A legacy given a child by a ſtranger, at the child's death, veſts in the father by the Statute of Diſtributions, although he took not out adminiſtration to ſuch child 260

An executor or overſeer, who has power by the will to act in every thing for the advantage of an infant, may lay out part of the perſonal eſtate in the purchaſe of lands, in the infant's name; but if he lends the money on a bad ſecurity, he muſt anſwer it out of his own pocket 273

An executor or adminiſtrator paying away the aſſets in ſatisfying ſimple-contract debts, can have no relief in equity againſt a bond debt, although they had no notice of it 534

An executor, who duly adminiſtrates the aſſets, ſhall not be prejudiced by an accident which happens after 540

Where an Executor ſhall be but a Truſtee.

A. by will gives ſeveral legacies to his relations, amounting to near the value of his eſtate, and makes *B.* and *C.* his executors, and gives them 20*l.* and intreats them to take the trouble of getting in his eſtate; teſtator lives 10 years after, and acquires an additional eſtate, decreed the ſurviving executor, but an executor in truſt, and that the new-acquired eſtate ſhould go to the legatees in proportion *Page* 12

Lands deviſed to be ſold for the payment of debts, and that the ſurplus ſhould be deemed part of the teſtator's perſonal eſtate, and go to his executors, and gives his executors 100*l.* apiece as a legacy; the ſurplus decreed a truſt in the executors, and ſubject to diſtribution; for the direction concerning the ſurplus, was only to exclude the heir, not to give it to the executors in their own right 81, 92

A huſband deviſes his library of books to *A.* except 10 books, ſuch as his wife ſhould chooſe, and made her executrix; this exception of the 10 books held not ſuch a deviſe to the wife, as ſhould exclude her from the ſurplus 231

A. made *B.* and *C.* executors, and deviſed ſeveral legacies to *B.* but made no diſpoſition of the ſurplus of his perſonal eſtate; the executors ſhall come in equally for their ſhare of the ſurplus, notwithſtanding the legacies deviſed to one of them; but if a bill had been exhibited by the next of kin, *Q.* whether they ſhould not both be conſidered as truſtees, as to the ſurplus 323. *Vid.* 566

Exemplification.

Exemplification of part of a patent, not ſuffered to be read in evidence, notwithſtanding the ſtatutes of 3 and 4 of *Edw.* VI. and 13 *Eliz.* where the other

other ſide have no time to conſult the patent roll, and ſo may be ſurprized by an imperfect exemplification *Page* 59

Expoſition of Words.

An agreement to make a leaſe with *uſual covenants*, ſhall be intended *uſual* all over *England*, and not thoſe in that particular county where the lands lie 25

A. deviſes to *B.* and *C.* his wife's children, as he called them, not owning them to be his, 10 *s.* apiece, *and no more*, and gave the children that he owned conſiderable legacies, *B.* and *C.* ſhall come in for a ſhare of the undiſpoſed ſurplus, for the words of excluſion muſt be taken ſtrictly 169

Words of recommendation and deſire are in a will expounded a deviſe 202

A limitation to one and his iſſue *procreatis*, takes in thoſe born after; to one and his iſſue *procreandis*, extends to thoſe born before 491

Extent.

By an Extent in Aid, taken out by a ſimple-contract creditor againſt himſelf, and the debt found, he preferred himſelf to bond creditors, who had recovered judgment againſt the executor, the executor not releaſable in equity. *Sed Q.* 47

An Extent in Aid is taken out by the king's receiver, againſt his own debtor, againſt whom a commiſſion of bankruptcy was before awarded, and the aſſignees under the commiſſion of bankruptcy, brought their bill in Chancery to ſet aſide the Extent in Aid, and after 15 years pendency of the ſuit, at the hearing the bill was diſmiſſed, for that the court of Chancery had no juriſdiction in caſes of this nature, which were only proper for the Exchequer, being the court of the king's revenue, and from which the Extent in Aid iſſued, and therefore only examinable there, and if ſet aſide here, yet the Exchequer might carry on the proceſs, till the debt cleared, according to the courſe of the court *Page* 153

Extinguiſhment.

A. on his marriage gave a bond of 600 *l.* with a warrant of attorney, to confeſs judgment thereon, defeaſanced on payment of 300 *l.* to his wife, if ſhe ſurvived; afterwards ſhe joined with him in a conveyance by fine of his real eſtate; held that this extinguiſhed her right or any lien created by this judgment on the real eſtate 333

Fine and Non-claim.

FINE fraudulently obtained and raſures in ſeveral parts of it to make it correſpond throughout, a crime in the officers who did it, but no cauſe for ſetting aſide the fine, or for a reconveyance of the eſtate in equity, and the examination proper only in the court where the fine was levied 150

Forfeiture.

Deviſee for life, remainder over, commits a forfeiture by levying a fine, and making a mortgage, for which, on ejectment, the remainder-man recovered, yet the mortgagee having no notice of the will, had a decree to hold, during the life of the mortgagor, and the rather, for that the mortgagor had made an affidavit, that there was no will, and that he was heir at law 108

Huſband and wife by marriage ſettlement, are made tenants for life, remainder to their firſt and other ſons of the marriage ſucceſſively in tail male; after the birth of their eldeſt ſon, and ſeven other children, they by leaſe and releaſe and fine, mortgage the

the lands; this is a forfeiture, and the mortgagor muſt loſe his money *Page* 591

Forfeiture by a copyhold. *Vide* Copyhold.

Foreign Parts.

An agreement made at *Paris*, on the marriage of two *French* people, touching the wife's fortune, decreed here to be executed accordingly 207

A native of *Holland*, poſſeſſed of a perſonal eſtate, both there and in *England*, and making his will in *Holland*, how it muſt be conſtrued, ſo as to take effect, notwithſtanding the difference between the laws of each country 577

Fraud.

A. being to procure 1000 *l.* for *B.* borrows it, and pays *B.* only 300 *l.* and takes other 300 *l.* himſelf, and the remaining 400 *l.* in goods which prove worth little or nothing; and for ſecuring the whole 1000 *l.* both gave recognizance, yet that being ſued againſt *B.* he brought his bill, and had a perpetual injunction againſt the recognizance, on payment of 300 *l.* only, and intereſt, by reaſon of ſome circumſtances of fraud in *A.* 80

A will as well as a deed, may be ſet aſide in Chancery, for fraud or circumvention 123

One being poor, drawn in to ſell an eſtate at a great undervalue; yet if no fraud, cannot be relieved 206

If a fine be obtained by fraud from a feme covert under age who dies, and her heir buys in a prior mortgage, and then levies a fine, and five years paſs, and thoſe who claim under the fine bring a bill to redeem, equity will not aſſiſt them claiming under ſuch fradulent title, and alſo by reaſon of the fine and non-claim 216

A copyholder by his will, intending to give the greateſt part of his eſtate to his godſon, and the other part to his wife; the wife perſuades him to nominate her to the whole, and that ſhe would give the godſon the part deſigned him, decreed againſt the wife, notwithſtanding the Statute of Frauds, *&c.* *Page* 3

A ſon and heir apparent, perſuades his father not to make a will, which he intended to have made, and which was to contain proviſions for his younger children, promiſing to do for them himſelf; equity decreed ſuch proviſion 4

Tenant in tail is prevented by the iſſue in tail from ſuffering a recovery, in order to provide for his younger children, by his promiſing to do for them himſelf; equity decreed againſt him 5

If a conveyance be fraudulent as to creditors, equity can ſet it aſide, without ſending it to be tried at law 14, 15

A. tenant in tail, remainder to *B.* in tail. *A.* not knowing of the intail, makes a ſettlement on his wife for life, for her jointure, which *B.* who knew of the intail, engroſſes, and after the death of *A.* recovered on ejectment againſt his widow; but in Chancery relieved, and perpetual injunction granted for this fraud in *B.* in concealing the intail, which, if it had been diſcloſed, the ſettlement might have been made good 35

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By the opinion of all the Juſtices of C. B. *E.* and *M.* were but tenants in common, and *E.* ſhall have a moiety of the profits during her life, and the other moiety, by the Statute of Frauds, belongs to the executors or adminiſtrators of *M.* as before that ſtatute it would have belonged to the heir of *M.* and of the teſtator, as profits undiſpoſed of, and reſulting to him *Page* 167

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he conſulted about the beſt method of ſecuring it to them) the clauſe in the will was obliterated, and the will republiſhed, and the bond was altered, and new ſecurity given in the name of *J. B.* in truſt for theſe two children; yet held, that this 3000 *l.* muſt be brought into Hotchpot, if they would entitle themſelves to any farther ſhare of the perſonal eſtate *Page* 269

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A portion deviſed to a daughter out of a

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A portion of 4000 *l.* deviſed out of lands to a daughter, if ſhe married with the conſent of *A.* and *B.* to be paid at her age of 21, or day of marriage, which ſhould firſt happen; but if ſhe married without ſuch conſent, then ſhe was to have 1000 *l.* only: the daughter dies about ſix years of age, decreed the portion ſhould ſink for the benefit of the heir, and not be ſubject to diſtribution, though ſtrongly inſiſted it was a legacy, and, as ſuch, recoverable in the Spiritual Court 140, 290

A term is created by marriage ſettlement, to raiſe 3000 *l.* for daughters portions within two months of the death of the ſurvivor of the huſband and wife; there being one daughter, the father deviſes the truſt lands to make good his wife's jointure, and to raiſe 3000 *l.* for his daughter's portion; the daughter ſhall not have two portions of 3000 *l.* and ſhe dying at the age of five years, and the portion to be raiſed out of land, it ſhall not be raiſed for her adminiſtrator, but the intereſt or maintenance the child was entitled to ſhall 195

Portions provided by marriage ſettlement for younger children, to be paid at ſuch time as the truſtees ſhall think proper; one of the children dying at 17, before any appointment, his portion ſhall ſink in the inheritance; but maintenance, and a ſum paid in placing him out apprentice, to be allowed out of the truſt eſtate 213

Conditions annexed to the payment of portions, and that they ſhall marry by conſent, *&c.* 227, 541, 562

A. deviſes to his two younger ſons and a daughter, out of lands, portions of 600 *l.* apiece, payable at 21, with maintenance: the daughter marries, and dies under age, having two children; held that this was not ſuch an intereſt veſted in her as ſhould go to her huſband as adminiſtrator *Page* 267

A portion given by a father, payable at a future time, ſhall carry intereſt, if no other proviſion is made for the child; *ſecùs*, if given by a ſtranger 337. *Vide* 367, 405, 503

A. deviſes 500 *l.* apiece to his three daughters, at their ages of 21, or marriage, to be paid out of his ſtock; and deviſes the rents of his real eſtate to his wife for life, in lieu of dower, and for the maintenance of his children, and towards making up their portions; and after his debts and legacies paid, deviſes his lands to his ſon, who, together with his wife, he made executors. The ſtock was but 100 *l.* value; the wife being dead, and the two eldeſt daughters having had their portions paid them, held, that the lands were liable, in the hands of the ſon, to the youngeſt daughter's portion 397

A. ſeized of an eſtate in poſſeſſion, and of a reverſion expectant on the death of *J. S.* deviſes the eſtate in poſſeſſion to his wife for life, and having a ſon and a daughter, he deviſes the eſtate in poſſeſſion, after his wife's death, and likewiſe his reverſion, to his ſon, upon condition that he paid the daughter 1000 *l.* within 12 months after the death of *J. D.* and on default, that ſhe may enter; *J. D.* died, living the wife and *J. S.*: on a bill brought by the daughter and her huſband, decreed the portion to be raiſed, though neither of the particular eſtates were determined 500

On a marriage-ſettlement, on failure of iſſue male, a term for years is created and veſted in truſtees, for raiſing a ſum of money for daughters, though there is no particular time appointed for raiſing it, and the words of the power are, that the truſtees ſhall raiſe it out of the rents, iſſues, and profits of the lands, as well by leaſing or demiſing of the ſame for 21 years, or three lives; yet may the truſtees, if there be occaſion, by way of anticipation, mort-

mortgage the lands, or raiſe the money any other way *Page* 583

Poſthumous.

A. conveys a term for years in truſt to raiſe 1500*l.* for ſuch child or children as ſhould be living at his death; a poſthumous child held a child living at his death, to take within the meaning of that truſt, which was not to be conſtrued ſo ſtrictly as a limitation at law 50

Power.

If a man gives his wife power to divide his eſtate amongſt his three children, ſhe muſt do it equally 256

Tenant for life, with power to make leaſes of all land anciently demiſed, reſerving the ancient rents, and of the other lands, reſerving the beſt improved rents, makes a general leaſe of all the lands, reſerving rent in the very words of the power. Leaſe adjudged void by the Lord-Keeper and Chief Juſtice *Trevor*, againſt the opinion of *Holt*, Chief Juſtice 257

By marriage-ſettlement there is a proviſo, that if the wife ſhall happen to ſurvive her huſband, not having iſſue, or without iſſue lawfully begotten between them, the wife to have power to diſpoſe of ſuch lands; the huſband dies, leaving iſſue; ſome years after, that iſſue dies without iſſue, and then the wife ſells thoſe lands; held ſhe had ſufficient power 293

If a man by will impowers his wife to diſpoſe of his perſonal eſtate, with the conſent of the truſtees, the wife, without ſuch conſent, cannot by her will deviſe it, and therefore the huſband, as to that part, is dead inteſtate 452

One makes a ſettlement, with power by deed to revoke it, and by the ſame deed, or any other from time to time, to limit new uſes; he revokes the ſettlement, and limits new uſes, but reſerves no farther power to himſelf; he cannot by virtue of the firſt power limit any other uſes *Page* 474

Proceedings.

If one be taken up on an attachment, either in proceſs, or in execution after a decree, yet in both caſes, on his appearing before the regiſter, he is to be diſcharged, and to anſwer the interrogatories at large, not in cuſtody; and if he be continued in cuſtody, the court on motion, and appearing before the regiſter, will diſcharge him 110

By an infant's coming of age, adminiſtration *durante minori ætate* ceaſes, and ſuit by ſuch adminiſtrator is thereby determined, ſo that the infant cannot go on therewith, but muſt begin anew, unleſs a decree to account were had, in which caſe the infant, on a bill brought for that purpoſe, may be allowed to go on therewith 174

Upon an appeal from the Rolls, or to the Houſe of Lords, no new matter to be inſiſted upon 295

The ſheriff cannot take a bail-bond upon an attachment for not paying coſts, but in ſuch caſe a meſſenger is to go to bring in the party 331

On appeal from the rolls to my Lord Chancellor, the cauſe is open, and the party is at liberty to read new proof, and offer what he can againſt the decree 496

Purchaſe and Purchaſer.

A particular in writing for the purchaſe of an eſtate, no writing within the Statute of Frauds, unleſs the party purchaſed by it, or that it was ſhewn him at the time of the purchaſe; ſo that if that contains more than the words in the conveyance will in ſtrictneſs carry, the purchaſer cannot compel a ſpecific execution of the reſidue on the particular 29

The wife joins with her huſband, in letting in an incumbrance on her jointure

jointure lands, and barring the eſtate tail, and then limits the uſes to the huſband for life; remainder to their daughters: the daughters are not purchaſers, ſo as to ſhut out a judgment creditor of the huſband's antecedent to the barring of the eſtate tail; but the limitation to them voluntary, unleſs the conſideration of the wife's parting with her jointure had extended alſo to the limitation to the daughters *Page* 113

A limitation to a ſecond ſon in remainder in tail, on a ſettlement on the marriage of the firſt ſon, and in conſideration of the wife's portion, makes not the ſecond ſon a purchaſer 224

A man purchaſing an eſtate by a particular, but in the conveyance itſelf part of the land is left out, equity will ſet it aſide 307

Recovery in Common.

A Common recovery no bar of a remainder, that is limited as a ſecurity for the raiſing a ſum of money 435

Releaſe.

Feme, *Ceſtuique Truſt* of a bond, marries the principal obligor, and after his death, the bond being put in ſuit againſt the ſurety, he could not be relieved in equity, becauſe like the caſe, where the huſband before marriage joins in aſſigning the woman's perſonal eſtate in truſt for herſelf, though urged it was a releaſe in equity, as the obligee marrying the obligor is a releaſe at law 41

Whether a releaſe given by one who marries the daughter of a freeman of *London*, ſhall bar the huſband and wife of their cuſtomary ſhare 544

Remainder.

Deviſe of chattels for life, with remainder over, good; but if of ſmall value, and the caſe require it, it may be otherwiſe *Page* 71

Deviſe of a perſonal eſtate to one and his iſſue, or to one, and if he die without iſſue, remainder over, the remainder is void 323, 421

Where the mean remainders determine, the eſtate for life and reverſion being in the ſame perſon, ſhall conſolidate 338

Rent.

Deviſee of a rent-charge of 100*l.* *per ann.* to be iſſuing out of the rents and profits of lands, which were worth but 50*l.* with power of diſtreſs, enters into the lands, and by will deviſes the arrears of the ſaid rent-charge, the deviſee ſhall recover in equity 122

One having granted a rent-charge, with clauſe of diſtreſs, and covenanted that the land ſhould be liable to the diſtreſs, dies, and the rent-charge being greatly in arrear, and no diſtreſs to be had, and the land untenanted, yet the court would not decree the grantor to ſet out a diſtreſs, or that the grantee ſhould hold the land till ſatisfied, nor vary the agreement of the parties 126

Tenant for life makes a leaſe for years, reſerving rent at *Lady-day* and *Michaelmas*, and dies on *Michaelmas-day* about 12 o'clock at noon, the rent ſhall go to his executor, and not to the remainder man; but if ſuch tenant had a power of leaſing, and had died in the manner aforeſaid, the rent, in reſpect of the continuance of the leaſe, muſt have gone to the remainder-man, as incident to the reverſion 555

Retainer.

Executor of an executor may retain towards ſatisfaction of the debt owing by the firſt teſtator, becauſe he is executor of the firſt teſtator; but if one be indebted by bond to *A.* and makes *A.* and *B.* executors, and dies, and then *A.* makes *C.* executor, and dies, in this caſe *C.* cannot retain, becauſe he is not executor of the firſt teſtator; but *B.* is his executor by ſurvivorſhip, and the only reaſon of allowing retainer is, becauſe the executor cannot ſue himſelf *Page* 179

Revocation.

One makes his will, and thereby deviſes certain lands, which he afterwards mortgages, this no total revocation of the will 33

One by will deviſes lands to truſtees in truſt, to pay 200 *l. per ann.* rent-charge to his wife for life for her jointure, and other legacies and charges thereout; after which he and his wife join in a mortgage for raiſing 8000 *l.* and levy a fine accordingly, and he executes a deed of truſt, to ſell for payment of debts, and the ſurplus to be to him and his heirs, yet after his death all this held no revocation, but only *pro tanto*, ſo that the wife allowed to come in for her 200 *l. per ann.* and the other legacies and charges to take place if ſufficient, if not in proportion 32

A portion given to a child ſubſequent to the making of a will, a revocation of the will *pro tanto* 183

Vide Satisfaction, Legacy

One deviſes his land by will, atteſted by three witneſſes, and afterwards makes another will of his land, which revokes all former wills, but this will is not duly executed; the laſt will being no will, and void, will not amount to a revocation of the former *Page* 459

Lands deviſed to one in fee, and afterwards mortgaged to the ſame perſon, is a revocation *in toto*, but if mortgaged to a ſtranger, a revocation *quoad* the mortgage only 514

Satisfaction.

ONE ſettles his eſtate on truſtees, to be ſold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants that the huſband ſhall have the eſtate 1500 *l.* cheaper than any other; after he by will revokes the ſettlement, gives the huſband 1500 *l.* and dies: this legacy held to be in ſatisfaction of the 1500 *l.* ſecured by the ſettlement 138

A. before marriage, covenants to ſettle lands, in conſideration of 2000 *l.* portion, on himſelf for life; remainder to their firſt and other ſons in tail; remainder to the daughter in tail; remainder to himſelf in fee, with a power of revocation reſerved to the wife's father then beyond ſea: the marriage is had, and a daughter born, and the huſband being taken ſick, deviſes 1500 *l.* to his daughter, and if his wife (being *enſient*) ſhould have a poſthumous daughter, ſhe to have 500 *l.* of the 1500 *l.* and if either died before 21, or marriage, the ſurvivor to have the whole; and gave all his lands to his wife and her heirs, and the ſurplus of his perſonal eſtate, after debts paid, to his wife, her executors, and makes her executrix; then another daughter is born, and the huſband dies without any alteration of his will, or any ſettlement made; decreed that a ſettlement be made, with a power of revocation to the

the father; and that legacies be likewiſe paid the children, the youngeſt daughter being a poſthumous child, within the intent of the will *Page* 175

Where a portion given a daughter after the father had made his will, ſhall be in ſatisfaction of a legacy given her in the will 183

A legacy of 150*l.* given by a collateral anceſtor to the daughter of *A.* which was paid *A.* and who after gave her 1000*l.* portion, ſettled a church-leaſe on her, and maintained her and her huſband fourteen years, yet held no ſatisfaction 228

A. gives bond to *B.* of 300*l.* conditioned to pay 20*l. per ann.* for life quarterly, without any deduction; the like annuity of 20*l. per ann.* afterwards given by *A.* by will to *B.* payable half yearly, and with ſuch deduction, held no ſatisfaction. 236

A wife parts with 14*l. per ann.* of her jointure, and the huſband gives her a note that his executors ſhould pay her that ſum during life, and he after by will gives her 14*l. per ann.* out of certain lands for life, held a ſatisfaction of the note 240

A. by will gives 750*l.* to his ſon, and afterwards buys him a cornetcy of horſe for 650*l.* which ſum was proved he intended to ſtrike out of his will; held that the 650*l.* ſhould go in diminution of the 750*l.* 263

Where a deviſe ſhall be a ſatisfaction for what is due to the deviſee 314

A debtor, without taking notice of the debt, deviſes a ſum as great, or greater, than the debt to his creditor, this ſhall be a ſatisfaction; *ſecùs*, if it were deviſed on a contingency, or it were leſs than the debt 394

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Scrivener.

A ſcrivener, who was employed to examine into a title, fails in his duty, by neglecting to make a thorough enquiry, &c. whereby his client is a ſufferer; afterwards the ſcrivener agrees to make him ſatisfaction another way; this agreement decreed in *ſpecie*, though urged that there was no conſideration 19

Scrivener or attorney puts out his client's money on a ſecurity, which he might on the leaſt inquiry have found to be defective, or even where he had notice of an ejectment, delivered on a prior mortgage, yet could not be charged in equity to anſwer the money 146

If one truſts his ſcrivener (who puts out money for him) with the cuſtody of his bond, and the ſcrivener receives the money and delivers up the bond, the obligee is barred as againſt the obligor for ever; *ſecùs*, in caſe of a mortgage, becauſe a legal eſtate is veſted, which cannot be diveſted without aſſignment 209

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A ſettlement after marriage, recited to be in conſideration of a portion ſecured, ſhall be preſumed to be in purſuance of an agreement previous to the marriage, though no proof of it, and ſo good againſt bond creditors 101

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A father makes a voluntary ſettlement to truſtees and their heirs, in truſt, to receive the profits, and put them out for the increaſe of the fortunes of his daughters *A.* and *B.* and alſo executes a bond to the ſame truſtees, to pay them 1000 *l.* at a certain day, in truſt for the ſaid daughters, but kept both deed and bond by him till his death, and received the profits; and then by will, taking notice of the bond, gives legacies to *A.* and *B.* in ſatisfaction thereof, and the ſurplus of his perſonal eſtate to his ſaid two daughters, and his four younger children; yet *A.* and *B.* electing to have the benefit of the ſettlement and bond decreed for them, and an account of the profits from the date of the ſettlement, and 1000 *l.* with intereſt, from the time it was payable by the bond 210

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A father, 1684, makes a voluntary ſettlement on his eldeſt ſon, and his heirs, without any power of revocation; and after made another ſettlement of the ſame lands to the ſecond ſon for life, with remainder to his firſt and other ſons in tail, and dies; the firſt deed comes to the heir of the eldeſt ſon, and the other to the ſecond ſon, who brought a bill to ſet aſide the firſt; but *per Cur'*, both deeds being voluntary, the proviſion for a younger ſon is no ſuch conſideration, as to induce the court to ſet aſide the firſt deed *Page* 235

A ſettlement made by a perſon going beyond ſea, though voluntary, not to be controuled by a letter wrote by him afterwards to the truſtees 305

Where a ſettlement ſhall be good and take effect, though not according to the intent of the parties 480

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Serving a *ſubpœna* at a place where the party lodged but once, and that two years before ſuch ſervice, is not good 99

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A miſtake in the title of an order amended, though to charge a ſurety, who gave a recognizance to abide the order of hearing 115

A ſurety made liable in equity, who by a miſtake was not bound by law 309

Survivor.

Deviſe of 100 *l.* to *A.* and *B. viz.* 50 *l.* to *A.* and 50 *l.* to *B.* payable at ſuch a time, and if either die before the time, than the 100 *l.* to the ſurvivor; the whole 100 *l.* decreed to the ſurvivor, notwithſtanding the ſevering clauſe, which holds only in caſe both live to the time of payment 37

A. deviſes portions to his four children, payable at their reſpective ages of 21 years, or marriage, and in caſe any of them ſhould die before the time of payment, or ſhould die without iſſue, then his or their ſhare to the ſurvivor or ſurvivors of them; one of them died under age, and without iſſue; this, though a limitation of a perſonal eſtate,

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A father makes a voluntary ſettlement to truſtees and their heirs, in truſt, to receive the profits, and put them out for the increaſe of the fortunes of his daughters *A.* and *B.* and alſo executes a bond to the ſame truſtees, to pay them 1000 *l.* at a certain day, in truſt for the ſaid daughters, but kept both deed and bond by him till his death, and received the profits; and then by will, taking notice of the bond, gives legacies to *A.* and *B.* in ſatisfaction thereof, and the ſurplus of his perſonal eſtate to his ſaid two daughters, and his four younger children; yet *A.* and *B.* electing to have the benefit of the ſettlement and bond decreed for them, and an account of the profits from the date of the ſettlement, and 1000 *l.* with intereſt, from the time it was payable by the bond 210

A limitation to a ſecond ſon in remainder, in tail, on a ſettlement made on the marriage of the firſt ſon, and in conſideration of the wife's portion, makes not the ſecond ſon a purchaſer 224

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eſtate, is good, but liable to the contingency of ſurvivorſhip, till it comes to the laſt of the four children *Page* 528

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creed to be a truſt for the *Ceſtuique Truſt*, no more than if *A.* borrows money of *B.* and therewith purchaſes lands, theſe purchaſed lands are no truſt; for it is not a truſt in writing, and a reſulting truſt it cannot be, becauſe that would be to contradict the deed by parol proof, directly againſt the Statute of Frauds; but if the purchaſe had been recited to have been made with the profits of the truſt eſtate, this appearing in writing, might ground a reſulting truſt *Page* 84

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FINIS.

ERRATA in the above TABLE.

Under title Baron and Feme, ſection 15, *for* 225, *read* 256.
Under title Bonds, &c. - - ſection 5, *for* 313, *read* 513.
Under title Condition, - - ſection 1, *for* 511, *read* 562.

ADDENDA.

Since the foregoing Sheets were printed, Mr. Brown has favoured the Public with a further Collection of Reports of Cases determined in the Court of Chancery during the 26 Geo. III. in which are contained the following Determinations; and which being applicable to the under-mentioned Cases in this Volume, the Reader is requested to add to the References already prefixed to them.

Case	51,	Page 50,	*vide* 2 Brown's Rep.	38,	Pierson *v.* Garnet.
	—	—		63,	Cooper *v.* Forbes.
	97,	— 109,	—	75,	Benyon *v.* Maddison.
	145,	— 173,	—	114,	Sadler *v.* Hobbs.
	163,	— 200,	—	38,	Pierson *v.* Garnet.
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	210,	— 256,	—	22,	Robinson *v.* Hardcastle.
	—	—	—	51,	Pitt *v.* Jackson.
	249,	— 325,	—	95,	Kirkman *v.* Kirkman.
	269,	— 392,	—	108,	Asburnor *v.* Macguire.
	289,	— 451,	—	60,	Webb *v.* Jones.
	300,	— 477,	—	57,	Tankerville *v.* Fawcet.
	—	—		101,	Tweddell *v.* Tweddell.
	303,	— 483.	—	75,	Benyon *v.* Maddison.

I have added these references,
H. H.

ERRATA.

Page 2, in margin, *for* Post 99, *read* Post 101.
90, line 24, *f.* regnum, *r.* regno.
92, in marg. after 2 Vern. 361, *r.* Antè 12.
136, line ult. *f.* is executor, *r.* is not executor.
164, in the references, *f.* Post 421, *r.* 491.
167, in ref. *f.* Antè 169, *r.* Antè 164.
183, in marg. *f.* Post 213, *r.* Post 263.
185, in marg. *f.* Burrows, *r.* 3 Burrow.
241, in ref. *f.* Antè 95, *r.* 97.
250, in marg. *f.* 2 Wms. 642, *r.* 710.
271, (N.) *f.* vol. iii. *r.* vol. ii.
378, line 5, *f.* for 1798, *r.* 1698.
414, in marg. *f.* Antè 68, *r.* Antè 63.
419, line 7, *f.* in, *r.* upon.
461, in ref. *f.* Antè 286, *r.* Antè 443.
562, in ref. *f.* Antè 290, *r.* 226.
593, in ref. *f.* 1 Dornat, *r.* 1 Domat.

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